Supreme Court, U.S.
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No. ___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

STUDIO ART THEATRE OF EVANSVILLE, INC., and WILLIAM MONTROSE,

Petitioners,

v.

CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND APPENDICES

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155 pp

QUESTIONS PRESENTED

I.

DOES A FACIAL CONSTITUTIONAL CHALLENGE TO CERTAIN STATE CRIMINAL STATUTES BROUGHT IN A FEDERAL 42 U.S.C. § 1983 CIVIL ACTION SEEKING ONLY DECLARATORY AND INJUNCTIVE RELIEF — AND WHICH NEED NOT INVALIDATE PRIOR STATE CRIMINAL CONVICTIONS — REPRESENT AN EXCEPTION TO *RES JUDICATA* AND COLLATERAL ESTOPPEL PURSUANT TO THE COMMENTS OF THIS COURT IN *ALLEN* v. *McCURRY*, 449 U.S. 90, 100-101 (1980)?

II.

CAN EITHER *RES JUDICATA* OR COLLATERAL ESTOPPEL SERVE TO BAR A FEDERAL 42 U.S.C. § 1983 CIVIL ACTION WHICH SEEKS TO PROTECT THE EXERCISE OF FUNDAMENTAL CONSTITUTIONAL RIGHTS BY HAVING CERTAIN STATE STATUTES DECLARED TO BE UNCONSTITUTIONAL, WHERE THE FEDERAL CLAIM NEED NOT INVALIDATE PRIOR STATE COURT CONVICTIONS, AND WHERE THE ACTION SEEKS ONLY PROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF TO PRECLUDE THE USE OF THE CHALLENGED STATUTES IN FUTURE PROSECUTIONS?

III.

MAY A FEDERAL COURT DISMISS, ON THE GROUNDS OF *RES JUDICATA* AND/OR COLLATERAL ESTOPPEL PREDICATED UPON THE CONCERNS OF FEDERALISM AND COMITY, A FEDERAL 42 U.S.C. § 1983 CIVIL ACTION SEEKING TO DECLARE CERTAIN STATE STATUTES UNCONSTITUTIONAL, WHEN THE LITIGANTS TO THE PRIOR STATE COURT CRIMINAL PROSECUTION WHICH WOULD SERVE AS THE BASIS FOR PRECLUSION, INCLUDING REPRESENTATIVES OF THE STATE ITSELF, ENTERED INTO A COMPREHENSIVE AGREEMENT PRIOR TO THE CONCLUSION OF THE STATE PROCEEDINGS THAT SPECIFICALLY ALLOWED FOR, IN THE EVENT THE CRIMINAL DEFENDANTS WERE UNSUCCESSFUL WITH THEIR CONSTITUTIONAL ARGUMENTS IN THE STATE COURTS, A SUBSEQUENT FEDERAL SUIT TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTES UNDERLYING THE STATE PROSECUTION?

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VI.

MAY A LITIGANT WHO HAS BEEN CONVICTED IN A STATE COURT, WHO HAS EXHAUSTED HIS/ITS STATE APPELLATE REMEDIES, BUT WHO CANNOT FOR WHATEVER REASON SEEK FEDERAL HABEAS CORPUS RELIEF (SUCH AS A CORPORATION WHICH CANNOT MEET THE "IN CUSTODY" REQUIREMENT), BRING A FEDERAL 42 U.S.C. § 1983 CIVIL ACTION TO DECLARE THE STATE CRIMINAL STATUTES UNDERLYING THE PROSECUTION TO BE UNCONSTITUTIONAL (AND TO PROVIDE COROLLARY INJUNCTIVE RELIEF TO PRECLUDE FUTURE ENFORCEMENT OF SUCH LAWS), FREE FROM THE CONSTRAINTS OF ANY POSSIBLE *RES JUDICATA* AND/OR COLLATERAL ESTOPPEL EFFECTS ARISING FROM THE STATE CRIMINAL CONVICTION?

VII.

FOR PURPOSES OF THE *RES JUDICATA*/COLLATERAL ESTOPPEL EFFECT OF A STATE COURT CRIMINAL CONVICTION ON A SUBSEQUENT FEDERAL 42 U.S.C. § 1983 CIVIL ACTION BROUGHT TO HAVE THE STATUTES UNDERLYING THE STATE PROSECUTION — WHICH IMPACT UPON THE EXERCISING OF

FUNDAMENTAL CONSTITUTIONAL RIGHTS — DECLARED TO BE UNCONSTITUTIONAL, IS LITIGATION OF AN ISSUE OF LAW BARRED IN THE FEDERAL FORUM WHEN IT IS APPARENT THAT THE SPECIFIC CONSTITUTIONAL QUESTIONS BEFORE THE FEDERAL COURT, ALTHOUGH RAISED IN THE STATE PROCEEDINGS, WERE NOT SPECIFICALLY ADDRESSED BY THE STATE COURTS?

VIII.

DOES THE LITIGATION OF AN "UNMIXED QUESTION OF LAW" IN THE CONTEXT OF A FEDERAL 42 U.S.C. § 1983 CIVIL ACTION, STILL REPRESENT AN EXCEPTION TO *RES JUDICATA* AND COLLATERAL ESTOPPEL PURSUANT TO THIS COURT'S PRONOUNCEMENTS IN *UNITED STATES* v. *MOSER*, 266 U.S. 236 (1924) AND *MONTANA* v. *UNITED STATES*, 440 U.S. 147 (1979), AND IF SO, UNDER WHAT CIRCUMSTANCES DOES THIS EXCEPTION APPLY?

LIST OF PARTIES AND RULE 29.6 LIST

The Petitioners before this Court are Studio Art Theatre of Evansville, Inc. and William Montrose. The Respondents before this Court are the City of Evansville, Indiana, Art Gann, as Chief of Police of the Evansville Police Department, Stanley Levco, as Prosecutor of the County of Vanderburgh, Indiana, and Pamela Carter, Attorney General of the State of Indiana.

Pursuant to Rule 29.6, the parent corporation of Studio Art Theatre of Evansville, Inc., is Imagination Corporation. Studio Art Theatre of Evansville, Inc. has no nonwholly owned subsidiaries.

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Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Seventh Circuit, and its order denying a petition for rehearing with suggestion for rehearing en banc.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 76 F.3d 128 (7th Cir. 1996), and is reproduced as Appendix ("Appx.") B; its unpublished Judgment – With Oral Argument is reproduced as Appx. C; and its unpublished Order denying a petition for rehearing with suggestion for rehearing en

banc is reproduced as Appx. A. The unpublished Order of the United States District Court for the Southern District of Indiana, Evansville Division, dismissing plaintiffs' complaint is reproduced as Appx. E; its accompanying unpublished Memorandum is reproduced as Appx. F; and its unpublished *sua sponte* Order raising the issues of *res judicata*/collateral estoppel is reproduced as Appx. D.

The prior order of this Court is reported at 494 U.S. 1056 (1990), and is reproduced as Appx. J.

The Order of the Indiana Supreme Court denying transfer is unreported, and is reproduced as Appx. I. The Opinion of the Indiana Court of Appeals is reported at 530 N.E.2d 750 (Ind. App. 1989), and is reproduced as Appx. H. The unpublished Findings of Fact and Conclusions of Law of the Vanderburgh County Circuit Court for the State of Indiana is reproduced as Appx. G.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment and Opinion on January 31, 1996. Petitioners then timely filed a petition for rehearing with suggestion for rehearing en banc, which was denied by the Seventh Circuit on March 22, 1996. This Court, by Justice Stevens, granted Petitioners' request for an extension of time in which to file this petition on June 5, 1996. Petitioners have filed this petition within the extension period, which expired on July 15, 1996. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. United States Constitution.

1. AMENDMENT I.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .".

2. AMENDMENT V.

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .".

3. AMENDMENT XIV, SECTION 1.

> ". . . No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. United States Code.

1. 28 U.S.C. § 1738.

> ". . . The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

All other federal statutes and applicable Indiana Code ("I.C.") sections are set forth in Appx. V, and are: 42 U.S.C. § 1983; I.C. §§ 34-3-18-1; 35-45-5-1; 35-45-6-1; 35-45-6-2; 35-49-2-2; 35-49-3-3; and 35-49-3-4.

STATEMENT OF THE CASE

This petition comes to this Court following over eleven years of litigation. For more than a decade — or

more specifically since April 29, 1985 — Petitioners have sought, unsuccessfully, to have a court (and there have been six of them), engage in one simple task; consider the constitutionality of an Indiana statute, I.C. § 35-49-3-3(3), which criminalizes the sale or display of materials which might be "harmful" to minors[1] within 500 feet of a church or school, *regardless of whether minors have or ever had access to such materials*. Petitioners have challenged the constitutionality of this statute, certain statutory defenses to it (I.C. § 35-49-3-4), and the use of this criminal law as a state RICO predicate, as violating the free speech and exercise clauses of the First Amendment, as well as the due process and equal protection clauses of the Fourteenth Amendment. During this decade-plus odyssey, and although raised by these Petitioners from the initiation of litigation, no court which has reviewed these cases has engaged in any direct constitutional analysis of these arguments, except to summarily cite to legal precedent that has absolutely nothing to do with the specific constitutional challenges raised by these Petitioners to I.C. §§ 35-49-3-3(3) and 35-49-3-4.

This petition does not, however, request this Court to review these arguments of fundamental First Amendment principles. Rather, these Petitioners seek a writ of certiorari to ultimately review the propriety of a federal district court dismissing an action brought by these Petitioners pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of these state statutes, on the basis that the federal action below was barred by *res judicata* and/or collateral estoppel; an issue which the court raised *sua sponte*.

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1 The definition of what constitutes matter deemed "harmful to minors" is set forth in I.C. § 35-49-2-2, which is basically itself a reiteration of this Court's test of what is "obscene as to minors" as established in *Ginsberg* v. *United States*, 360 U.S. 629, 633 (1968), and as was subsequently modified, *sub silencio*, by *Miller* v. *California*, 413 U.S. 15 (1973).

In addition, the facts of this case do not derive from any in-court proceedings. No formal "trial" has ever occurred and no testimony has ever been taken. Rather, Petitioners have not shied away from or disputed the evidentiary basis underlying the claims of the parties, and have stipulated to the relevant facts both in the Vanderburgh County Circuit Court in the State of Indiana (Appx. Q), and in the federal district court (Appx. P). As a result, the preclusion issue raised by the district court pertains solely to a pure question of law; with at no time Petitioners attempting to relitigate or challenge any relevant facts. The stipulated evidence is as follows.

A. Statement Of The Facts

Petitioner Studio Art Theatre of Evansville, Inc. ("Studio Art") has operated a retail "adult" entertainment business located in the City of Evansville, Indiana, since 1978. Petitioner William Montrose ("Montrose") is the president of Studio Art. Studio Art is primarily engaged in the sale of videotapes, books, and magazines, and in the exhibition of live entertainment and motion picture films in its bookstore, theatre and entertainment complex. The business premises are located in a fully enclosed building, and there is no ability to see or view from the outside of the premises any of the inventory and/or merchandise offered for sale or rental in the store, nor is there any ability to either hear or view from the exterior of the premises any of the films showing, or live entertainment occurring, therein.

Exterior signs instruct patrons that access to the store premises is restricted to those eighteen (18) years of age or older; the materials and entertainment therein were only available to adults; and the Defendants below had never alleged or charged that minors under the age of eighteen (18) were ever either upon the business premises, had access to, or otherwise could view the display of any materials, books, magazines, films, or performances. Furthermore, there has never been a con-

tention over the past twelve years that any of the materials displayed or sold within Studio Art, or the performances occurring therein, would meet the legal standard of being obscene as to adults.

Studio Art is, however, located within 500 feet of the property lines of two churches and a Catholic school.

On April 29, 1985, an Indictment was filed in the Vanderburgh Circuit Court against these Petitioners and others alleging violations of the state "RICO" statute, and in particular, I.C. § 35-45-6-2(a)(3). The asserted "predicate acts" for this RICO prosecution were claimed violations of I.C. § 35-49-3-3(3); selling or displaying material "harmful" to minors within 500 feet of a church or school.

Prior to trial, the parties to that action — the State of Indiana through the Vanderburgh County Prosecutor's Office, the Petitioners, and two other corporations which are not at issue here — entered into an Agreement (Appx. R) where Montrose and the two other corporations were dismissed as defendants from all charges, where stipulated evidentiary facts were established, and where the appellate and other legal remedies of the parties were set forth. This Agreement had Studio Art give up certain and numerous fundamental constitutional rights, including the obligation to hold the prosecution to its burden by proving the facts of the alleged crime beyond a reasonable doubt (in that it entered into a stipulation of facts thereby); its right to trial by jury; its right to appeal the amount of fine imposed up to a certain limit; its right to engage in live constitutionally protected entertainment if it was unsuccessful in its state appellate remedies; its right to engage in constitutionally protected conduct if it was unsuccessful in all of its state and federal remedies (Studio Art was to close in that event, and even agreed to refrain in the future from conducting any constitutionally protected business in the *entire county*); and its right of speedy trial. Appx. R, ¶'s 6, 7, 8, 10, and 12.

Although divorcing Studio Art of all of these rights, paragraph 9 of the Agreement not only acknowledged the right to direct appellate review, but it also stipulated that Studio Art was to be entitled to:

> ". . . [A]ssert any right in the Federal Courts, allowed by law to STUDIO ART, raising therein any and all constitutional arguments relating to the legality and/or constitutionality of the Indiana Corrupt Business Influenced Act pursuant to which STUDIO ART is charged, the use of the Indiana Obscenity Statue, I.C. 35-49-3-3, et. seq., as predicate acts thereunder, the constitutionality of the Obscenity to Minors Statute, I.C. 35-49-3-3, and any other defenses properly raised by STUDIO ART in these [the State Court criminal] proceedings . . ." (clarification added).

Paragraph 10 discussed Studio Art's "rights in the State and Federal Courts", but stipulated that upon unsuccessful exhaustion of *both* state and federal redress, Studio Art was to cease business. However, paragraph 10 further held that:

> "This Agreement to cease business shall be null and void in the event that STUDIO ART is successful in either the State or Federal court systems in overturning its conviction pursuant to the AMENDED INDICTMENT and/or in the event that STUDIO ART is successful in the State or Federal Court system in obtaining a declaration of unconstitutionality of any part of the statutes (I.C. 35-45-6-2, I.C. 35-49-3-1, et. seq.), upon which STUDIO ART's conviction rests. In the event STUDIO ART is successful in obtaining a declaration by either a State or Federal Court that any of the State statutes or portions thereof are unconstitutional requiring a reversal of the conviction or a determination of unconstitutionality or construction of said statute of which STUDIO ART could not have been prosecuted initially,

> then the PROSECUTOR will assist in seeking a dismissal of the charges against STUDIO ART, a dismissal of said prosecution, and STUDIO ART will have no obligation to cease its business".

Finally, that same paragraph dictated that upon unsuccessful conclusion of the *state* appellate proceedings, Studio Art was to cease all live entertainment, but that:

> "STUDIO ART, however, shall have the right to otherwise continue the operation of its business pending the assertion (which STUDIO ART agrees to file and diligently pursue no later than thirty (30) days after finality of all State Court appellate rights and any appeal of Petition for Writ of Certiorari to the United States Supreme Court), of its rights in the Federal Court system". *See, also,* Appx. R, ¶11 (containing similar language).

B. Statement Of Proceedings And Dispositions In The Courts Below

1. THE STATE COURT PROCEEDINGS.

In the initial state criminal prosecution, the only remaining defendant pursuant to the Agreement, Studio Art, challenged the constitutionality of the Indiana RICO statute, the constitutionality of I.C. § 35-49-3-3(3) as well as its use as a predicate to that offense, and the constitutionality of the "defenses" to the predicate statute as set forth in I.C. § 35-49-3-4. Specifically, Studio Art asserted that the latter two statutes were void as violating the First Amendment free speech and free expression clauses, as well as both the due process and equal protection clauses of the Fourteenth Amendment. Nevertheless, the Vanderburgh Circuit Court subsequently found Studio Art guilty under the RICO statute predicated upon four violations of I.C. § 35-49-3-3(3), and in reference to the constitutional challenges, held as follows:

> "Indiana's Racketeer Influences and Corrupt Organization Act, as it pertains to predicate offenses of obscenity, does not violate the First and Fourteenth Amendments to the United States Constitution. *4447 Corp.* v. *Goldsmith*, (1987), — IN —, 504 N.E.2d 559, 564". Appx. G-8.

No mention was made, however, to the constitutional challenges raised in regard to I.C.§§ 35-49-3-3(3) and 35-49-3-4.

Studio Art appealed this conviction to the Indiana Court of Appeals, which rendered a decision on November 27, 1988, affirming the conviction. Appx. H. In reference to the same constitutional issues raised in the county circuit court, the Indiana appellate court observed:

> "The cases of *4447 Corp.* v. *Goldsmith Inc.*, (1987) 504 N.E.2d 559; and *State* v. *Sappenfield*, (1987), Ind. App., 505 N.E.2d 504, *trans. denied*, concern the relation of the State's obscenity statute, I.C. 35-49-1-1 to 3-4, to the RICO statute. Those cases held that the RICO statute is not unconstitutional as applied to the obscenity statute. A petition for certiorari on *4447 Corp.* is currently pending in the Supreme Court of the United States. Discussion in those cases specifically addressed the first and fourteenth amendments and the argument made that the statutes were unconstitutionally vague. The same arguments were presented here, and in addition thereto, other remote constitutional arguments are presented with hinge on first and fourteenth amendment rights.
>
> Because these matters have been presented to and ruled upon by our supreme court, we do not deem it necessary to discuss them further. If the reader so desires, he is directed to those cases for further edification". 530 N.E.2d, at 752; Appx. H-5.

Yet, again, no discussion was given to the constitutional challenges raised to either I.C. §§ 35-49-3-3(3) or 35-49-3-4.

Transfer to the Indiana Supreme Court was denied in an Order dated September 21, 1989, with two Justices, including the Chief Justice, voting to grant transfer. Appx. I. Studio Art then petitioned to this Court for a writ of certiorari, which was also denied. 494 U.S. 1056 (1990). Appx. J.

2. THE FEDERAL COURT PROCEEDINGS.

As a result of the state court conviction and pursuant to the terms of the Agreement as referenced above, Studio Art, along with Montrose, then filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Indiana, Evansville Division, seeking to declare I.C. § 35-49-3-3(3) and portions of I.C. § 35-49-3-4 as violative of the federal constitution, both facially and as applied, and to enjoin further prosecutions thereby either directly or as predicates for a RICO charge. Appx. N. Accordingly, the District Court had proper "federal question" jurisdiction over this matter conferred by 28 U.S.C. § 1331, and jurisdiction conferred by 28 U.S.C. § 1343 and § 2201.

The defendants to that action were the City of Evansville, Indiana, Ray Hamner, Chief of Police of the Evansville Police Department, Robert J. Pigman, then prosecutor of the County of Vanderburgh, Indiana, and Lindley Pearson, then attorney general of the State of Indiana.[2] Defendants Pigman and Pearson filed a two-page answer to the complaint, generally denying the unconstitutionality of the statutes challenged. Appx. O. No affirmative defenses were raised in that answer. *Id.*

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2 Defendants Pigman and Pearson were subsequently replaced in the action below by their officials' successors, Stanley Levco and Pamela Carter, respectively.

It does not appear that either the City of Evansville or Art Gann ever filed an answer to Plaintiffs' complaint.

The parties ultimately filed a joint stipulation of facts in the District Court on October 7, 1993, reciting most of the above-described developments. Appx. P.[3] Importantly, the stipulation acknowledged that the defendants had indicated that they would continue to prosecute the Petitioners if any violations of I.C. § 35-49-3-3(3) occurred in the future. Appx. P-5 and P-6, at ¶'s 14, 15.

On November 12, 1993, Petitioners filed a motion for partial summary judgment and a brief in support, asserting that based upon the stipulation of facts the court could rule on the constitutionality of the challenged statutes as a matter of law, requesting the court to enter the relief as prayed for in their complaint, and submitting a formal request for oral argument on this motion. The various defendants then moved for numerous enlargements of time in which to file their briefs in response to plaintiffs' motion for partial summary judgment, which were invariably granted by the District Court. Following the fifth extension of time sought by defendants Levco and Carter, the District Court entered an Order on February 2, 1994 indicating that "[t]his is the last extension of time which will be permitted in regards to this brief barring the severest of circumstances". Appx. K-1.

Defendants Levco and Carter did, indeed, then file a memorandum of law in opposition to plaintiffs' motion. Defendants City of Evansville and Art Gann were granted a further extension by the District Court to file a brief, although they failed to submit responsive pleadings in the time allowed. In a handwritten portion of an Order entered on June 8, 1994, the Magistrate held:

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3 This stipulation filed in the federal district court also incorporated by reference the previous stipulation (Appx. Q) which had been filed in the state county circuit court. Appx. P-4, at ¶9.

> "The Def's City of Evansville and Art Gann have waived their opportunity to file a brief and may not now file any such brief". Appx. L.

While Petitioners had previously, and formally, requested oral argument on their motion for partial summary judgment, no such hearing was ever scheduled.

Rather, three and one-half months later, and almost four years after the filing of the initial complaint, on September 30, 1994, the District Court issued a show cause raising, *sua sponte*, the question of whether Petitioners' claim was barred by the doctrines of *res judicata* and issue preclusion, or by this Court's then-recent decision in *Heck* v. *Humphrey*, 512 U.S. ___, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Appx. D.

On December 9, 1994, Petitioners filed a brief in response to the District Court's order, and specifically requested oral argument with regard to this issue. Defendants Levco and Carter filed a response to plaintiffs' brief, although Defendants City of Evansville and Art Gann never submitted any pleadings on this issue. Without granting oral argument, the District Court issued an Order and Memorandum of May 18, 1995, dismissing plaintiffs' complaint and denying plaintiffs' motion for partial summary judgment as being moot. Appx.'s E and F. The District Court found the Petitioners' federal action barred by the doctrines of *res judicata* and collateral estoppel (pursuant to 28 U.S.C. § 1738), and never reached the issue of whether this Court's decision in *Heck* v. *Humphrey* precluded the bringing of this suit.

Petitioners then appealed to the Seventh Circuit, which exercised its jurisdiction pursuant to the provisions of 28 U.S.C. § 1291 regarding an appeal of right from a final judgment of a district court of the United States. The Court of Appeals subsequently affirmed the District Court decision in an opinion dated January 1, 1996. Appx. B. Although Petitioners had raised in their

initial brief to the Seventh Circuit the contentions that a facial constitutional challenge to a statute represents an exception to *res judicata*/collateral estoppel, and that these doctrines did not preclude declaratory and injunctive relief brought to restrain unconstitutional governmental action in the future (*see* excerpts of Court of Appeals brief reproduced as Appx.'s U-1 through U-6), the circuit court declined to write on these issues. Thereafter, Petitioners timely filed a petition for rehearing with suggestion for rehearing en banc on February 13, 1996, which was denied in an Order dated March 22, 1996. Appx. A.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW, THAT BEING WHETHER A FACIAL CONSTITUTIONAL CHALLENGE IS AN EXCEPTION TO THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL IN THE CONTEXT OF A SUBSEQUENT ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983, AND TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

This Court has recognized exceptions to *res judicata* and collateral estoppel in the context of § 1983 actions. One of them is when the "party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court". *Haring* v. *Prosise*, 462 U.S. 306, 313 (1983), citing *Allen* v. *McCurry*, 449 U.S. 90, 101 (1980). This Court has further noted that additional exceptions may be warranted in § 1983 actions "in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights'". *Haring*, 462 U.S. at 313-14 (citations

omitted).[4] Statements by this Court indicate that a *facial constitutional challenge* to a statute is one such additional appropriate exemption.

In *Allen*, this Court noted that:

> "In reviewing the legislative history of § 1983 in *Monroe* v. *Pape*, [440 U.S. 147 (1961)] the Court inferred that Congress had intended a federal remedy in three circumstances: where *state substantive law was facially unconstitutional*, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. . . . In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights". *Allen*, 449 U.S. at 100-101 (clarification and emphasis added, citations omitted).

This Court then observed that the two procedural law elements discussed there were "essentially the same" as the exception that had already existed; that being the opportunity for a "full and fair" ability to litigate the claim or issue decided by the first court. *Id.* Since this Court has already specifically observed that at least two of the three circumstances specifically referred to in the legislative history were already incorporated into known exceptions to the preclusion doctrine in § 1983 cases, it only seems to reason that the third element discussed in the legislative history, *that being where the state substantive law was facially unconstitutional*, is an appropriate exception as well.

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4 This Court has already recognized additional exceptions when "controlling facts or legal principles have changed significantly since the state-court judgment . . . or when special circumstances warrant exception to the normal rules of preclusion". *Haring*, 462 U.S. at 313, n.7 (citations omitted).

That this, in fact, already appears to be the conclusion of this Court is reinforced by the dissenting opinion of Justice Blackmun who, when in criticizing the holding of the majority in *Allen*, noted that:

> ". . . The Court's recounting of the legislative history and its articulation of these three purposes were intended only as illustrative of *why* the 42d Congress chose to establish a federal remedy in federal court, not a delineation of *when* the remedy would be available". *Allen*, 449 U.S. at 111 (Blackmun, J., dissenting) (emphasis in original).

Therefore, in unsuccessfully arguing for a much broader ability to bring § 1983 actions in the context of prior state criminal prosecutions, Justice Blackmun concluded that the majority's holding in *Allen* delineated just three exceptions to the general preclusive nature of prior state court adjudications; two procedural, and one substantive (i.e., that the underlying law is facially unconstitutional). The District Court below rejected this contention (Appx. F-10), and the Court of Appeals failed to address this issue.

In addition, there appears to be a split among the circuits with regard to this Court's comments concerning a facial constitutional attack as set forth in *Allen*. The Third Circuit appears to follow *Allen* and holds that a claim of facial unconstitutionality of a law would represent an exception to *res judicata*/collateral estoppel. *Linnen* v. *Armainis*, 991 F.2d. 1102, 1108 (1993). *See also*, the New York district court decision in *DiRosa* v. *Dodd*, 514 F. Supp. 258, 265 (E.D.N.Y. 1981); and *Southcenter Joint Venture* v. *National Democratic Policy Committee*, 780 P.2d 1282, 1285 (Wash. 1989) (relitigation of important issues of law should not be foreclosed by collateral estoppel). The First, Seventh, and Eighth Circuits appear to reach the opposite conclusion. *See, e.g., Arecibo Radio Corporation* v. *Commonwealth of Puerto Rico*, 825 F.2d 589, 592-93 (1st Cir. 1987); *Vandenplas* v. *City of Muskego*, 797 F.2d 425, 429-31 (7th Cir. 1986); *Medvick* v. *City of University*

City, Missouri, 995 F.2d 857, 858 (8th Cir. 1993), *cert. denied*, 126 L.Ed.2d 420 (1993).

Because the decisions of the courts below appear to be at odds with the holding of this Court in *Allen*, because protecting the liberty of the citizenry in being free from prosecution under facially unconstitutional laws is an important obligation of the federal judiciary, and because there appears to be a conflict among the circuits on this issue, this Court should accept this matter for review. This case, where fundamental First Amendment rights are at stake and where no court below, either in the federal or state systems, has specifically addressed let alone ruled upon the constitutionality of I.C. §§ 35-49-3-3(3) and 35-49-3-4, presents an ideal forum for this Court to address this fundamental constitutional concern.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT CONSTITUTIONAL PRINCIPLE OF WHETHER *RES JUDICATA* OR COLLATERAL ESTOPPEL SHOULD PRECLUDE, FOLLOWING AN UNSUCCESSFUL CONSTITUTIONAL CHALLENGE IN A STATE CRIMINAL PROCEEDING, RELITIGATION OF THE CONSTITUTIONALITY OF STATE STATUTES IN A SUBSEQUENT ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983 SEEKING *PROSPECTIVE* DECLARATORY AND INJUNCTIVE RELIEF TO PREVENT THE USE OF SUCH STATUTES AS A BASIS FOR *FUTURE* PROSECUTIONS.

Plaintiffs' complaint in the federal district court below sought, among other things, to declare the Indiana statutes at issue to be unconstitutional and to enjoin their use for *future* prosecutions. Appx. N (see particularly N-1, at ¶1, and N-10, at "wherefore" ¶'s 1 and 2). In this regard, the Parties' Joint Stipulation of Facts filed in the district court stated that the Respondents had threatened *future* prosecution of the Petitioners, as well as the officers, agents, and employees of Studio Art, for

violations of I.C. § 35-45-6-2 and the predicate offense of I.C. § 35-49-3-3(3).[5] Appx. P, ¶'s 14, 17.

This Court has indicated in *Wolley* v. *Maynard*, 430 U.S. 705, 710-712 (1977), that post-state court conviction federal actions seeking declaratory and *prospective* injunctive relief would not be barred by *Younger* abstention. A number of courts have considered this Court's statements in *Wolley* to also hold that such subsequent federal actions are not barred by the doctrines of *res judicata*/collateral estoppel. *See, e.g.*, *Mustfov* v. *Rice*, 633 F. Supp. 1255, 1259-60 & n. 3 (N.D. Ill. 1987); *Mustfov* v. *Superintendent of Chicago Police Dept.*, 733 F. Supp. 283, 292 (N.D. Ill. 1990). *See, also*, *Neufeld* v. *City of Baltimore*, 820 F. Supp. 963, 966, 969 (D. Md. 1993), *cert. denied*, 116 S.Ct. 1852 (1996) (holding that a civil action pursuant to § 1983 seeking to enjoin the future enforcement of an ordinance on the ground that it is constitutionally preempted was not barred by either *res judicata* or collateral estoppel, even though the plaintiff to that action had been convicted in a state court proceeding of violating the ordinance that was ultimately, in the federal action, declared to be void). In fact, even the same circuit which adjudicated the instant appeal below has held in an earlier decision that traditional principles of preclusion allow additional litigation if *some new wrong occurs*. *Supporters to Oppose Pollution, Inc.* v. *Heritage Group*, 973 F.2d 1320, 1326 (7th Cir. 1992).

While this issue was briefed to both the district and circuit courts below as a basis to allow Petitioners' fed-

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5 Adjudication in the federal district court of Petitioners' constitutional rights would *not* have required invalidation of the prior state court conviction. Declaratory relief of the unconstitutionality of the charging statute would have, nonetheless, resulted in the *contractual* abrogation of that conviction pursuant to the terms of the Agreement. *See*, Appx. R, ¶'s 9 & 10. The fact that the federal action below would not have required invalidation of the state court conviction is also relevant to the argument concerning this Court's decision in *Heck* v. *Humphrey*, 512 U.S. ___, 129 L.Ed.2d 383 (1994), as set forth in Section V, *infra*.

eral action to proceed, neither court discussed this legal principle in its ruling. These discrepancies, when considered in light of the other decisions set forth above, exemplify that direction is needed from this Court with regard to its comments in *Wolley*, which have been recognized, at least by some courts, to constitute an exception to the doctrine of preclusion.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE ISSUE OF WHETHER THE FEDERALISM AND COMITY CONCERNS UNDERLYING FEDERAL RELUCTANCE TO RELITIGATE THE CONSTITUTIONALITY OF A STATE COURT CONVICTION WARRANT INVOCATION OF THE PRECLUSION DOCTRINE IN A CIRCUMSTANCE WHERE THE PARTIES, WHICH INCLUDE SUBDIVISIONS AND REPRESENTATIVES OF A STATE, ENTER INTO A WRITTEN AGREEMENT ALLOWING FOR SUBSEQUENT FEDERAL REVIEW OF THE CONSTITUTIONALITY OF THE STATE STATUTES WHICH SERVED AS THE BASIS FOR THE PRIOR STATE PROSECUTION.

Appx. R sets forth the comprehensive Agreement entered into by the parties in the state court criminal proceeding, which allowed for the relitigation in the federal system, upon conclusion of unsuccessful state court challenges, of the constitutionality of the underlying state criminal statutes. *Id.*, ¶'s 9, 10, 11. The district court did not discuss this Agreement in its decision, but referred to the circumstances of when "sensitive questions touching the relations between the federal government and those tattered quasi-sovereigns, the states, are involved" to "ensure that appropriate comity is observed." Appx. F-8, citing *Wood* v. *Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991). The Seventh Circuit's consideration of the effect of the Agreement was its succinct comment that the "benefits of precluding relitigation of issues finally decided run not only to the litigants, but also to the judicial system". Appx. B-3.

Yet, this case does not involve mere private litigants. It concerns the entry into a comprehensive Agreement where criminal defendants give up numerous constitutional rights otherwise afforded to them, with a representative of the state, in this case the Vanderburgh County Prosecutor's office, agreeing to the ability of the criminal defendants to later raise constitutional challenges to the charging statutes in federal court, should the defendant's arguments in the state criminal proceedings prove to be unavailing.

While federalism and comity are certainly applicable to the concern of giving federal judicial respect to the decisions of a state, those important concerns have absolutely no place in a case such as this where the state itself, through its representatives, has agreed to subsequent federal review. Rather, federal courts in these type of circumstances should look at their underlying obligation in an action brought pursuant to § 1983 where the "state courts were unable or unwilling to protect federal rights". *Haring* v. *Prosise*, 462 U.S. 306, 313-14 (1983) (citations omitted). Review should be granted on this issue pursuant to Supreme Court Rule 10.1(a), because the decision of the Court of Appeals in this regard has so far departed from the accepted and usual course of judicial proceedings that exercise of this Court's power of supervision is called for.

IV.

CERTIORARI SHOULD BE GRANTED TO PROVIDE GUIDANCE AS TO THE CONSTITUTIONAL PARAMETERS OF UTILIZING STATE RULES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL TO PRECLUDE FEDERAL ADJUDICATION OF FUNDAMENTAL FEDERAL CONSTITUTIONAL RIGHTS IN A CIVIL RIGHTS ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983.

The *res judicata* effect of state-court decisions in § 1983 actions "is a matter of state law". *Heck* v. *Humphrey*, 512 U.S. ___, 129 L.Ed.2d 383, 390 n.2 (1994). Of course, in utilizing any such state remedies, there

must be compliance with the fundamental concerns of due process as embodied in the federal constitution.

Collateral estoppel operates in Indiana to bar subsequent relitigation of the same fact or issue where that fact or issue was *necessarily adjudicated* in a former suit and the same fact or issue is then presented in a subsequent action. *Sullivan* v. *American Cas. Co. of Reading, PA.*, 605 N.E.2d 134, 137 (Ind. 1992). "Contrary to claim preclusion [*res judicata*] which applies to all matters that were or might have been litigated; issue preclusion [collateral estoppel] requires that matter be *actually litigated and determined therein*". *Hood* v. *G.D.H. By Elliott*, 599 N.E.2d 237, 240 n.2 (Ind. App. 1 Dist. 1992) (emphasis in original, clarifications added), citing *In Re Marriage of Moser*, 469 N.E.2d 762, 766 (Ind. App. 1984). The prime consideration in applying collateral estoppel in Indiana is whether the party against whom the prior judgment is pled had a full and fair opportunity to litigate the issue and whether it would be *otherwise unfair* under the circumstances to permit the use of collateral estoppel". *Sullivan*, 605 N.E.2d at 138 (emphasis added).

This "unfairness" doctrine seems to be nothing more than a recognition that in certain circumstances, due process will foreclose the use of the preclusion doctrine in acting as a bar to relitigation of particular matters. This Court has termed this due process limitation to be a consideration of whether there are "special circumstances" which warrant exception to the normal rules of preclusion. *Haring* v. *Prosise*, 462 U.S. 306, 313 n.7(1983). For the following reasons, this case provides an ideal vehicle for this Court to address the due process constraints when applying *res judicata*/collateral estoppel in an effort to prevent a § 1983 suit which has been brought to adjudicate the protections afforded to the exercising of fundamental constitutional rights.

A. The State of Indiana here, through its representatives, entered into an Agreement whereby the Petitioners gave up numerous constitutional rights, but

where there was an acknowledged ability of the Petitioners to seek federal redress should the state courts fail to rule certain charging statutes as being unconstitutional. This issue is particularly telling in this action, given the fact that the Respondents never raised the issue of either *res judicata* or collateral estoppel as an affirmative defense.

B. By invoking preclusion against Petitioner William Montrose, who was *dismissed* as a criminal defendant in the state court proceedings pursuant to the terms of the Agreement, he has been placed in the proverbial "trick bag" of now being barred from obtaining any federal review of the constitutionality of statutes that had been charged against him. Had he not entered into the Agreement, remained a defendant to the state criminal proceedings, and then been subsequently convicted, he would have been entitled to federal redress pursuant to habeas corpus review.

C. The status of the law in the State of Indiana at the time of the execution by the parties of the Agreement allowing for the subsequent federal action, at the time of the state court criminal conviction, and, more importantly, at the time of both the filing and the answering of the federal civil action below, was such that the state court criminal conviction would *not* have precluded this federal civil claim. Prior to 1993, judicial precedent in Indiana was such that the judgment in a criminal action was not admissible in a subsequent civil case. *Brooks* v. *State*, 291 N.E.2d 559 (Ind. 1973); *Montgomery* v. *Crum*, 161 N.E. 251 (Ind. 1928); *Swingle* v. *State Employees' Appeal Commission*, 452 N.E.2d 178, 182 (Ind. App. 1983) (and citations therein). *See also*, *Kuhn* v. *State Ex rel. Van Natta*, 404 N.W.2d 1360, 1362 (Ind. App. 1980) (indicating that the court there was *not* holding that a defendant may not challenge the validity of a prior criminal conviction by a collateral attack, but only that a defendant may not do so by way of a civil habitual traffic offender proceeding).

Subsequent to the decision in *Kuhn*, but before the holding in *Swingle*, however, the State of Indiana adopted in 1982, I.C. § 34-3-18-1, which allows for the *admissibility* in a civil action of evidence of a final judgment in a criminal felony matter to prove "any *fact* essential to sustain the judgment . . ." (emphasis added). There is no precedent from Indiana courts addressing whether this provision applies to issues of law as opposed to facts, although Petitioners argued to the federal courts below that this statute had no application to questions of law as would be the case here. Yet, more importantly, as noted by the Indiana Supreme Court, that statute was a "nullity" until expressly approved by that court over a decade after its adoption by the legislature.

In *Hawkins* v. *Auto Owners (Mutual) Insurance Co.*, 608 N.E.2d 1358 (Ind. 1993), the court observed the legal history as referenced above, and noted that because state supreme court rules prevailed over statutes, the Indiana Code provision, until adopted by that court, was "a nullity". *Id.* at 1359. The court went on, however, to judicially adopt as of that date — February 11, 1993 — the text of that code provision. Consequently, until the holding of *Hawkins*, Indiana law would not have barred the federal action below.

In addition, subsequent to *Hawkins* the Indiana Supreme Court limited the reach of I.C. § 34-3-18-1 and its interpretation of it in the fractured decision of *Kimberlin* v. *DeLong*, 637 N.E.2d 121, 125 (Ind. 1994), *cert. denied*, 133 L.Ed.2d 53 (1995). In *Kimberlin*, the Indiana Supreme Court held:

> "Upon further consideration, we today *retreat* from our implied holdings in *Hawkins* regarding the conclusiveness of the judgment and the admissibility of the criminal trial transcript. Thus, while a criminal felony judgment may be admitted in evidence, such conviction is *not necessarily conclusive proof if the civil case of the*

> *factual issues determined by the criminal judgment . . .". Id.*, at 124 (emphasis added).

The supreme court did, however, further conclude that in the particular circumstances of that case, the use of collateral estoppel was not "unfair". *Id.*, at 125. *See also, State Farm Fire and Cas. Co.* v. *Miles*, 730 F. Supp. 1462, 1466 & n.4 (S.D. Ind. 1990), *aff'd., sub nom., State Farm Fire and Cas. Co. v. Summerfield*, 930 F.2d 25 (7th Cir. 1991) (an earlier decision, but in accord with the *Kimberlin* rationale).

D. There was no true adjudication of the constitutional issues which Petitioners have been raising for the past twelve years. The ultimate constitutional questions underlying the district court action below were whether a specific portion of the Indiana "obscenity to minors" statute, I.C. § 35-49-3-3(3), and the defenses as set forth in I.C. § 35-49-3-4, were constitutional, and whether violations of those statutes could be used as a predicate for a state RICO prosecution. There was, however, *no* request in *this* action to have the Indiana RICO statute declared as unconstitutional.

In their decisions denying the constitutional challenges raised in the state proceedings, the Vanderburgh County Circuit Court and the Indiana Court of Appeals simply relied on two legal precedents to deny Petitioners (then-Defendants) relief; *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559 (Ind. 1987); and *State* v. *Sappenfield*, 505 N.E.2d 504 (Ind. App. 1987). Those cases were adjudicated by this Honorable Court in *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). However, neither *4447 Corp.*, nor *Sappenfield*, nor *Fort Wayne Books* — which of relevance considered only the constitutionality of using obscenity related charges as RICO predicates — addressed in any regard whatsoever the underlying issue of the ultimate constitutionality of the specific obscenity to minors statute challenged in the federal action below. In fact, in its petition to this Court for a writ of certiorari in regard to the state criminal prosecution, Studio Art specifically addressed the fact that

the Indiana Court of Appeals had failed to address the constitutionality of I.C. § 35-49-3-3(3), and actually suggested that this Court remand the case back to the Indiana Court of Appeals for consideration of this important constitutional claim. *Studio Art Theatre of Evansville, Inc.* v. *Indiana*, No. 89-847.

Petitioners also challenged in the federal action below the constitutionality of the state obscenity to minors statute and the defenses thereto under the equal protection clause of the Fourteenth Amendment, as well as under the establishment clause of the First Amendment. Yet, again, neither *4447 Corp.*, nor *Sappenfield*, nor *Fort Wayne Books*, addressed, let alone decided, *any* of these constitutional issues raised in this federal action.

Based on the precedent relied upon by the Indiana courts, it should be clear that the issues raised in the federal district court below had not be "actually adjudicated", and preclusion in such circumstances, where fundamental rights are involved, would appear to be constitutionally inappropriate. This Court has observed that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation". *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481 (1982).

V.

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE ISSUE, APPARENTLY RESERVED IN *HECK* v. *HUMPHREY*, 512 U.S. —, 129 L.Ed.2d 383 (1994), OF WHETHER A LITIGANT UNAFFECTED BY THE PROTECTIONS AFFORDED BY THE FEDERAL HABEAS CORPUS STATUTE COULD RELITIGATE A CONSTITUTIONAL CLAIM IN A SUBSEQUENT FEDERAL ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983, AND TO RESOLVE A DISPUTE AMONG THE CIRCUITS ON THIS MATTER.

Given the timing of the District Court's *sua sponte* invocation of the issues of *res judicata* and collateral estoppel, it seems clear that the impetus for doing so

was this Court's then-recent decision in *Heck* v. *Humphrey*, 512 U.S. ___, 129 L.Ed.2d 383 (1994). Yet, neither federal court below ultimately addressed the *Heck* issue.

At issue in *Heck* was the question of whether a state prisoner could, in effect, challenge the constitutionality of his conviction by a suit for *damages* brought pursuant to 42 U.S.C. § 1983. Justice Scalia, writing for the majority, noted that the resolution of that issue depended upon the interplay of the federal civil rights statute and the federal habeas corpus statute. 129 L.Ed.2d, at 390. Unresolved in *Heck*, however, is the issue of the preclusive effect of a state criminal proceeding to a subsequent federal civil rights action, where there is no ability to invoke habeas corpus relief. Neither Petitioner here had available to it such a federal remedy.

Montrose was dismissed from the state court prosecution pursuant to the terms of the Agreement, and was obviously not then convicted.[6] Under prior precedent from the Seventh Circuit, Studio Art, a corporation, could not invoke § 1983 relief as a form of *quasi* habeas relief. *See*, *Waste Management of Wisconsin, Inc.* v. *Fokakis*, 614 F.2d 138 (7th Cir. 1980), *cert. denied*, 449 U.S. 1060 (1980).

The majority in *Heck* concluded that a claim for damages pursuant to § 1983 could not be brought in the circumstance at issue there unless the plaintiff could prove that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal

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6 It is, in fact, an interesting anomaly of this litigation that had Montrose remained a criminal defendant and then been convicted along with Studio Art, he would then have a *right to* federal court review of his constitutional claims pursuant to habeas corpus relief, although the analogous federal redress by him is now being foreclosed by the federal courts below on the ground of preclusion.

court's issuance of a writ of habeas corpus . . .". 129 L.Ed.2d at 394. Justice Souter, however, wrote a lengthy concurrence on behalf of himself and Justices Blackmun, Stevens and O'Connor. The concurrence discusses the issue here — not facially before the Court in *Heck* — of what happens to those litigants who cannot invoke federal habeas corpus relief because they are not "in custody". The four member concurrence noted that such a litigant should be entitled to invoke relief under 42 U.S.C. § 1983. *Id.*, 403-404.

In addition, there appears to be a conflict among the Circuits on the concern noted by the *Heck* concurrence of whether those who cannot invoke habeas relief may file an action pursuant to 42 U.S.C. § 1983 to nonetheless gain federal review of a state conviction. *Compare, Fokakis*, 614 F.2d 138; and *United States* v. *Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744 (3rd Cir. 1979) (no); *with Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978); and *Shipp* v. *Todd*, 568 F.2d 133 (9th Cir. 1978) (most likely concluding "yes"). *Cf., Sperl* v. *Deukmejian*, 642 F.2d 1154 (9th. Cir. 1981). The Fifth Circuit has expressed conflicting opinions on this issue. *Compare, Battieste* v. *City of Baton Rouge*, 732 F.2d 439, 440-41 & n.1 (5th Cir. 1984) (yes); *with Cavett* v. *Ellis*, 578 F.2d 567 (5th Cir. 1978) (no). *See also, Rimmer* v. *Fayetteville Police Dept.*, 567 F.2d 273, 276-77 (4th Cir. 1977), and cases cited therein (not only impliedly recognizing the right of those who cannot invoke habeas relief to be able to bring a federal claim pursuant to the civil rights statute, but also asserting that the preclusion doctrine should not apply in such circumstances); and this Court's denial of certiorari in *Hanson* v. *Circuit Court of the First Judicial Circuit of Illinois*, 444 U.S. 907 (1979) (White, J., dissenting), noting this dispute among the circuits and other courts.

This Court should accept this case for review to consider the issue raised by the four member concurrence in *Heck*, but not addressed by the majority therein, of the relief available to a litigant pursuant to 42 U.S.C.

§ 1983 who cannot seek federal redress of a state court conviction through habeas corpus, and to resolve this dispute among the circuits. This case, which unlike *Heck* only requested declaratory and injunctive remedies rather than monetary compensation, and where there *was* exhaustion of state remedies (the concern underlying the *Heck* decision), presents an ideal venue to resolve this question.

VI.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE "UNMIXED QUESTION OF LAW" EXCEPTION TO *RES JUDICATA*/COLLATERAL ESTOPPEL IS STILL VIABLE, AND IF SO, UNDER WHAT CIRCUMSTANCES IT WOULD APPLY.

This Court has previously noted that litigation involving an "unmixed question of law" presents an exception to the preclusive nature of a prior state action to a subsequent § 1983 claim. *United States* v. *Moser*, 266 U.S. 236, 242 (1924); *Montana* v. *United States*, 440 U.S. 147, 162-63 (1979). This exception has been noted by this Court to be of "particular importance in constitutional adjudication". *Montana*, 440 U.S., at 162-63. In more recent years, however, this Court has questioned the propriety of this exception. *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984). *Cf.*, *Southcenter Joint Venture* v. *National Democratic Policy Committee*, 780 P.2d 1282, 1285 (Wash. 1989) (relitigation of important issues of law should not be foreclosed by collateral estoppel). This case, which concerns a pure question of law that, Petitioners respectfully assert, had not been truly adjudicated in the state court proceedings, and which involves the concerns of fundamental First Amendment rights, presents an ideal vehicle for this Court to address this issue.

CONCLUSION

For the reasons as are set forth above, and to ensure that the fundamental First Amendment issues underlying the litigation receive, one day, considered analysis by at least one court, Petitioners respectfully request that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

By: /s/ BRADLEY J. SHAFER*

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Of Counsel

Dated: July 11, 1996

No. _____

In The

Supreme Court of the United States

October Term, 1996

STUDIO ART THEATRE OF EVANSVILLE, INC., and WILLIAM MONTROSE,

Petitioners,

v.

CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals — Seventh Circuit — Chicago, Illinois)

(Dated March 22, 1996)

(STUDIO ART THEATRE OF EVANSVILLE, INCORPORATED, and WILLIAM MONTROSE, Plaintiffs-Appellants, vs. CITY OF EVANSVILLE, INDIANA, ART GANN, Chief of Police of the Evansville Police Department, STANLEY LEVCO, Prosecutor of the County of Vanderburgh, Indiana, et al.,

Defendants-Appellees — No. 95-2374; Appeal from the United States District Court for the Southern District of Indiana, Evansville Division, No. 90 C 192; Gene E. Brooks, Judge)

Before: Hon. WALTER J. CUMMINGS, Circuit Judge;
Hon. RICHARD D. CUDAHY, Circuit Judge,
Hon. JOEL M. FLAUM, Circuit Judge.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellants on February 13, 1996, and the response of defendants-appellees, no judge in active service has requested a vote on the suggestion for rehearing en banc and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

OPINION
[*Reported at* 76 F.3d 128]

(United States Court of Appeals — Seventh Circuit)

(Argued December 1, 1995; Decided January 31, 1996)

(STUDIO ART THEATRE OF EVANSVILLE, INCORPORATED, and WILLIAM MONTROSE, Plaintiffs-Appellants, vs. CITY OF EVANSVILLE, INDIANA, ART GANN, Chief of Police of the Evansville Police Department, STANLEY LEVCO, Prosecutor of the County of Vanderburgh, Indiana, et al., Defendants-Appellees — No. 95-2374; Appeal from the United States District Court for the Southern District of Indiana, Evansville Division, No. 90 C 192; Gene E. Brooks, Judge)

Before: CUMMINGS, CUDAHY and FLAUM, Circuit Judges.

CUMMINGS, Circuit Judge.

This appeal involves application of issue preclusion (collateral estoppel) and claim preclusion (res judicata) under Indiana law. Studio Art Theatre of Evansville, Indiana, and its president William Montrose filed this suit pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 alleging that an Indiana statute violated various provisions of the federal Constitution. Studio Art was previously convicted in the Circuit Court of Vanderburgh County, Indiana, of violating the state RICO statute, Ind. Code § 35-46-6-2(a)(3), with a predicate offense of unlawfully selling pornographic materials within 500 feet of a church and school in violation of Ind. Code § 35-49-3-3(3). The conviction was affirmed by the Indiana Court of Appeals. *Studio Art Theatre of Evansville, Inc.* v. *State*, 530 N.E.2d 750 (Ind. Ct. App. 1989). Studio Art's petition to transfer was denied by the Supreme Court of Indiana (App. I)* and certiorari was

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*[*Printer's Note*]: **References to appendices throughout this Seventh Circuit Opinion are to original documents, and not necessarily to items reproduced *infra* in this book.**

also denied, 494 U.S. 1056. Studio Art has now raised the same constitutional arguments in the district court as it raised in the state courts. Thus the district court properly dismissed the action on the ground that Studio Art was precluded from relitigating the statute's constitutionality.

In December 1987, the Indiana trial court convicted Studio Art. Studio Art challenged the constitutionality of the obscenity statute and its use as a predicate offense. In his opinion holding that Studio Art violated the Indiana RICO statute, Circuit Judge Miller responded to defendant's constitutional argument as follows:

> Indiana's Racketeer Influenced and Corrupt Organization Act, as it pertains to predicate offenses of obscenity, does not violate the First and Fourteenth Amendments to the United States Constitution. *4447 Corp.* v. *Goldsmith* (1987), ___, IN ___, 504 N.E.2d 559, 564 (App. H at 7.)

Although the trial court did not expressly address the constitutionality of the underlying obscenity statute, it implicitly found the statute constitutional by holding that it was a valid RICO predicate offense and by upholding the conviction.

On appeal to the Indiana Court of Appeals, Studio Art again argued that the statutory provisions involved here were unconstitutional, but the argument was rejected on the ground that the same statutory provisions had already been held constitutional in *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559 (Ind. Ct. App. 1987), and *Estate of Sappenfield*, 505 N.E.2d 504 (Ind. Ct. App. 1987). Although the court did not specifically address the underlying obscenity statute, it added that "other remote constitutional arguments are presented which hinge on first and fourteenth amendment rights," and stated "[b]ecause these matters have been presented to and ruled upon by our supreme court, we do not deem it necessary to discuss them further." 530 N.E.2d at 752.

Since the trial court's judgment regarding the constitutionality of the predicate offense was there expressly affirmed, while the constitutionality of the underlying obscenity statute was implicitly affirmed, plaintiff's argument in this civil case that the issue had not been finally decided in the state criminal proceeding is unpersuasive. Studio Art also argues that the two cases relied upon by the Indiana Court of Appeals are inapposite. That argument is similarly unpersuasive since it goes to whether the court was correct in its conclusion rather than to whether the issue had been finally decided.

In November 1993, plaintiffs filed a motion for partial summary judgment in the district court civil case based on the same First and Fourteenth Amendment arguments that had been raised and rejected in challenging Studio Art's criminal conviction. In September 1994, the court ordered plaintiffs to show cause why their actions were not barred by the doctrines of res judicata and collateral estoppel or by the principles announced in *Heck* v. *Humphrey*, 114 S. Ct. 2364. Studio Art argues that defendants had waived the preclusion issue based on a comprehensive settlement agreement. Regardless, the district court retained the power to raise the issue *sua sponte*, which it did. See, *e.g.*, *Salahuddin* v. *Jones*, 992 F.2d 447, 449 (2d Cir. 1993), certiorari denied, 114 S. Ct. 278. The benfits of precluding relitigation of issues finally decided run not only to the litigants, but also to the judicial system.

In May 1995, Judge Brooks filed a memorandum opinion denying plaintiffs' motion for partial summary judgment and dismissing the complaint. As the court noted, both the Indiana trial court and Court of Appeals had held that the Indiana statute was constitutional, so that "the doctrines of res judicata and collateral estoppel apply to an attempt to relitigate issues previously decided by those courts." (App. A at 13.) The court concluded that Studio Art was barred by the doc-

trine of issue preclusion. The court added that since plaintiff Montrose was and is the president of Studio Art and had an opportunity to participate in Studio Art's defense and assertion of its constitutional rights in the criminal suit against it, he must be considered a privy to the prior Studio Art lawsuit and therefore precluded from bringing his current constitutional claims. See *Tofany* v. *NBS Imaging Sys., Inc.*, 597 N.E.2d 23, 28-29 (Ind. Ct. App. 1992). The district court held that res judicata (claim preclusion) and collateral estoppel (issue preclusion) both apply to this case (App. A at 13) because the same issues and same claims presented below had been decided against Studio Art in the state courts.

In deciding whether to give preclusive effect to state court judgments, federal courts look to state law in the state where the original action was decided. *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 988 F.2d 1480, 1487 (7th Cir. 1993). The Indiana Supreme Court decided in *Kimberlin* v. *DeLong*, 637 N.E.2d 121, 125 (Ind. 1994), certiorari denied, 116 S. Ct. 98, that collateral estoppel (issue preclusion) applies with respect to a criminal conviction in a subsequent civil suit, and doubtless Indiana courts would apply the kindred doctrine of res judicata (claim preclusion) as well. Consequently, since the same issues and claims were already decided adversely to plaintiffs in the Indiana courts, Judge Brooks was correct in holding that Studio Art was precluded from relitigating their constitutional challenges in federal court.

Plaintiffs assert that the claims in the state and federal actions were not the same, thus barring application of res judicata. Even if so, collateral estoppel applies to this case because identical issues were tendered in both the civil suit below and the prior criminal case. See *Bojrab* v. *John Carr Agency*, 597 N.E.2d 376, 378-379 (Ind. Ct. App. 1992); *Gorski* v. *Deering*, 465 N.E.2d 759, 762 (Ind. Ct. App. 1984). Collateral estoppel is a "nar-

rower application" of preclusion and applies "where a *particular issue* is adjudicated in a prior action and is put in issue in a subsequent suit on a different cause of action between the same parties or their privies." *Gorski*, 465 N.E.2d at 762 (emphasis in original). Both the state court action and the present civil action turn on the same tendered issue of whether the statute is constitutional. Since the issue was decided in the Indiana courts, the present suit is barred by collateral estoppel.

Studio Art attempts to avoid collateral estoppel by arguing that Montrose, now a party to the civil suit but not previously a defendant in the criminal case, is not in privity with Studio Art. As Studio Art's president, Montrose was clearly in privity and cannot relitigate the issues decided against his company. Parties are in privity when "there is a commonality of interest between the two entities" and when they "sufficiently represent" each other's interests. *Tofany*, 597 N.E.2d at 29; see also *Donovan* v. *Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985). Given the close relationship between Studio Art, a relatively small company, and Montrose, as well as the fact that Montrose was originally named as a defendant in the criminal case and faced with identical charges as Studio Art prior to reaching a settlement with the state, we are unpersuaded by Studio Art's argument. As in *Donovan*, Montrose and Studio Art had a clear "congruence" of legal issues with respect to the statute, thus establishing privity. 778 F.2d at 301.

Studio Art's claim that it was denied a full and fair opportunity to litigate the issue is similarly unpersuasive. Where a party is represented by counsel, had ample opportunity to present evidence and exhibits, and also had appellate review, he is presumed to have had a full and fair opportunity to litigate. See *Brown* v. *J.I. Case Co.*, 813 F.2d 848, 854 (7th Cir. 1987), certiorari denied, 484 U.S. 912. Nowhere does Studio Art argue that

it did not have the opportunity to fully brief and argue its constitutional claims in the Indiana courts; rather, plaintiffs rely on the fact that the published opinions of the state courts seemed to give short shrift to the constitutional issues. But this goes to the question of whether the issue was actually litigated in the state courts. Even an issue determined by a court with little analysis or explanation may be actually litigated for purposes of collateral estoppel. See *Friarton Estates Corp.* v. *City of New York*, 681 F.2d 150, 159 (2d Cir. 1982). In light of the passages quoted above from the state trial court and the appellate court, and the implicit findings that the obscenity statute was constitutional, we are persuaded that Studio Art's constitutional challenges were actually litigated and that Montrose is barred by privity. A necessary implicit finding by the state court, coupled with language that indicates awareness of the issues, is sufficient to preclude relitigation. Both are present here.

Judgment affirmed.*

A true Copy:
Teste: *Clerk of the United States Court of Appeals for the Seventh Circuit*

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* **Because we dispose of this case on collateral estoppel grounds, it is unnecessary to discuss *Heck* v. *Humphrey*, *supra*, on which plaintiffs also rely.**

APPENDIX C

JUDGMENT — WITH ORAL ARGUMENT

(United States Court of Appeals —
Seventh Circuit — Chicago, Illinois 60604)

(Dated January 31, 1996)

(STUDIO ART THEATRE OF EVANSVILLE, INCORPORATED, and WILLIAM MONTROSE, Plaintiffs-Appellants, v. CITY OF EVANSVILLE, INDIANA, ART GANN, Chief of Police of the Evansville Police Department, STANLEY LEVCO, Prosecutor of the County of Vanderburgh, Indiana, et al., Defendants-Appellees — No. 95-2374; Appeal from the United States District Court for the Southern District of Indiana, Evansville Division, No. 90 C 192; Gene E. Brooks, Judge)

Before: Honorable Walter J. Cummings, Circuit Judge;
Honorable Richard D. Cudahy, Circuit Judge,
Honorable Joel M. Flaum, Circuit Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX D

ORDER

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Dated September 30, 1994)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, vs. CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

This Matter is before the Court *sua sponte*. The Plaintiffs' Motion for Partial Summary Judgment and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment were filed November 12, 1993. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed February 4, 1994. Plaintiffs' Reply to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed June 30, 1994. The Parties' Joint Stipulation of Facts was filed October 7, 1993.

While this pending motion could be dispositive, consideration of the Plaintiffs' claims on the merits may be inappropriate at this juncture for two reasons.

First, the Court believes that the principles of *res judicata* and issue preclusion *may* bar litigation of the constitutionality of the Indiana statutes that form the subject matter of the case at bar because Studio Art previously presented these claims for review by the Indiana Court of Appeals and the United States Supreme

Court and a decision on the merits was made in that action.

Second, in considering the United States Supreme Court's recent decision in *Heck* v. *Humphrey*, 62 U.S.L.W. 4594, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994), and reasoning contained therein, the Court questions whether the Plaintiffs have stated a valid claim for which relief may be granted.

After having duly considered the foregoing, as well as the relevant case and statutory law, the Court hereby ORDERS that the Plaintiffs show cause within twenty (20) days of the issuance of this order why the doctrines of *res judicata* and issue preclusion do not bar their claims and why the United States Supreme Court's decision in *Heck* does not bar this action.

IT IS SO ORDERED this 30th [handwritten] day of ~~October~~ September [handwritten], 1994, at Evansville, Indiana.

/s/ GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: Distribution to all Counsel of Record

APPENDIX E

ORDER

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Dated May 18, 1995)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, vs. CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

This Matter is before the Court on the Plaintiffs' Motion for Partial Summary Judgment and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment filed November 12, 1993. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed February 4, 1994. Plaintiffs' Reply to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed June 30, 1994. The Parties' Joint Stipulation of Facts was filed October 7, 1993.

On September 30, 1994, the Court issued a *sua sponte* Order directing that the Plaintiffs show cause why their claims are not barred by the principles of *res judicata* and issue preclusion, and why the United States Supreme Court's decision in *Heck* v. *Humphrey*, 512 U.S. —, 129 L.Ed.2d 383 (1994) does not bar this action. The Plaintiffs' Brief in Response to the District Court's Show Cause Order was filed December 9, 1994. The Brief of Defendants Levco and Carter in Response to Plaintiffs'

Brief in Response to Show Cause Order was filed April 21, 1995.

After considering the foregoing, as well as the relevant case and statutory law, the Court hereby DISMISSES the Plaintiffs' Complaint. Accordingly, the Plaintiffs' Motion for Partial Summary Judgment is DENIED AS MOOT.

This is a final judgment of the Court.

IT IS SO ORDERED this 18th [handwritten] day of ~~April~~ May [handwritten], 1995, at Evansville, Indiana.

/s/ GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: All Counsel of Record

APPENDIX F

MEMORANDUM

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Dated May 18, 1995)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, vs. CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

This Matter is before the Court on the Plaintiffs' Motion for Partial Summary Judgment and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment filed November 12, 1993. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed February 4, 1994. Plaintiffs' Reply to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed June 30, 1994. The Parties' Joint Stipulation of Facts was filed October 7, 1993.

On September 30, 1994, the Court issued a *sua sponte* Order directing that the Plaintiffs show cause why their claims are not barred by the principles of *res judicata* and issue preclusion, and why the United States Supreme Court's decision in *Heck* v. *Humphrey*, 512 U.S. —, 129 L.Ed.2d 383 (1994) does not bar this action. The Plaintiffs' Brief in Response to the District Court's Show Cause Order was filed December 9, 1994. The Brief of Defendants Levco and Carter in Response to Plaintiffs' Brief in Response to Show Cause Order was filed April 21, 1995.

STATEMENT OF RELEVANT FACTS

The facts in this matter have been stipulated to by all parties. (See Parties' Joint Stipulation of Fact)

The Plaintiff Studio Art Theatre of Evansville, Inc. ("Studio Art") is the owner and operator of a retail adult entertainment business located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, Indiana, which has continually engaged in the business of retail sales of sexually explicit and other expressive and non-expressive matter at this location since 1978. Plaintiff William Montrose ("Montrose") is the president of Studio Art. Studio Art is primarily engaged in the sale of videotapes, books and magazines and the exhibition of live entertainment and motion picture films in its bookstore, theatre and entertainment complex located at 2113 West Franklin Street and has offered, now offers, and wishes to continue to offer such matter to the interested adult public.

Studio Art's complex is a fully enclosed building, and there is no ability to see or view from the outside of the premises any of the inventory and/or merchandise offered for sale or rental in the store, nor is there any ability to either hear or view from the exterior of the premises any of the films showing or live conduct occurring therein. In addition, exterior signs instruct patrons that access to the store premises is restricted to those 18 years of age and older.

Defendant Art Gann ("Gann") is the Chief of Police of the Evansville Police Department and has the authority conferred on him by statute to enforce the statutes of Indiana and the ordinances of the City of Evansville, Indiana. Defendant Stanley M. Levco ("Levco") is the Prosecutor of Vanderburgh County and has the prosecutorial authority given him by the statutes of the State of Indiana including, but not limited to, the authority to file informations initiating criminal proceedings within the County of Vanderburgh, Indiana. Defendant Pamela

Carter is the Attorney General of the State of Indiana and has the authority conferred on her by the statutes of the State of Indiana including, but not limited to, the duty to defend where appropriate the constitutionality of the statutes of the State of Indiana.

The Defendants City of Evansville, Gann and Levco and their agents, servants, employees, deputies, officers, and other persons acting under their direction and control, have prosecuted Studio Art and its employees and Montrose for violations of Ind. Code § 35-45-6-2, (the "RICO" statute), using as predicate acts violations of Ind. Code § 35-49-3-3.

On April 29, 1985, an Indictment (Cause No. 5436) was filed in the Vanderburgh Circuit Court against Studio Art, Montrose, and other parties alleging various acts in violation of Ind. Code § 35-45-6-2(a)(3).

On June 4 1987, an Amended Indictment in Cause No. 5436 was filed charging Studio Art, Montrose and other parties with a violation of Ind. Code § 35-45-6-2(a)(3).

On October 19, 1987, the Vanderburgh Circuit Court granted the State's motion to dismiss the Amended Indictment against Montrose and the other parties, leaving Studio Art as the sole remaining defendant in the proceeding.

The Vanderburgh Circuit Court entered Findings of Fact in Cause No. 5436, finding that Studio Art was guilty of four (4) counts of Ind. Code § 35-49-3-3(3) and that Studio Art was guilty of corrupt business influence, a violation of Ind. Code § 35-45-6-2(a)(3).

St. Boniface Catholic School is a school for seventh and eighth grade school children, which operates its school year from the Tuesday following Labor Day through the end of the first week of June and is located at 2301 West Michigan Street, Evansville, Indiana. St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith and is

located at 418 North Wabash Avenue, Evansville, Indiana. Simpson United Methodist Church is a church used for the religious services by members of the Methodist faith and is located at 2201 West Illinois Street, Evansville, Indiana.

The business premises of Studio Art is located within five hundred (500) feet, measured by straight-line distance, of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and the Simpson United Methodist Church, and was so located at all times relevant to these proceedings.

Because of the proximate location of Studio Art to the churches and school, Montrose and Studio Art and its officers, employees and independent contractors have in the past been prosecuted by Gann and Levco for violating Ind. Code § 35-49-3-3(3) for selling or displaying for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church, and for violation of the State RICO statute, Ind. Code § 35-45-6-2, using as predicate acts for that charge the violations of Ind. Code § 35-49-3-3(3).

Gann and Levco have indicated that they will continue to prosecute Montrose and Studio Art, its officers, agents, and employees for violations of Ind. Code § 35-45-6-2 and the predicate offense of Ind. Code 35-49-3-3(3) in the future should any matter deemed "harmful to minors" be displayed on the premises or be sold to any person on the premises of Studio Art. Defendants have not alleged or charged to date that either Studio Art or Montrose has violated any subsection of Ind. Code § 35-493-3 other than Ind. Code § 35-49-3-3(3) ("obscenity statute").

Studio Art sells and rents material and provides entertainment performances to the adult public that are harmful to minors in that they describe or represent nudity, sexual contact and sexual excitement; consid-

ered as a whole, appeal to the prurient interest in sex of minors; are patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and considered as a whole, lack serious literary, artistic, political, ar scientific value for minors. Studio Art has engaged in these activities and continues to engage in these activities knowingly and intentionally in the ordinary course of its business.

Defendant the City of Evansville, Indiana, by and through the Evansville Police Department and its officers, deputies, and other persons, at the direction of or in cooperation with Defendant Levco, has indicated that it may prosecute Montrose, Studio Art and its employees and independent contractors for the continued sale or display of adult motion picture films, videotapes, books, magazines and live entertainment that could be deemed harmful to minors within five hundred (500) feet of the nearest property line of the school or church.

All of the activities stipulated to by Studio Art in the way of the presentation, the display, sale and rental of videotapes, books, magazines, together with the exhibition of live entertainment and motion picture films, were done inside the business premises of Studio Art.

Defendants have not alleged or charged to date that minors under the age of eighteen (18) were ever upon the business premises of Studio Art; had access to, or otherwise could view the display of, any material, books, magazines, films, or ant [*sic*] performances on the business premises of Studio Art from the exterior thereof; or that the sale and presentation of such material, books, magazines, and films and the presentation of any such performance has occurred except inside said premises and to and before adult customers.

The Plaintiffs filed their complaint in this action December 28, 1990, alleging that I.C. § 35-49-3-3 is un-

constitutional as written and in the Defendants' application of the statute to the Plaintiffs. (Complaint ¶ 1). The Plaintiffs ask that the Court permanently enjoin the Defendants' enforcement of I.C. § 35-49-3-3 against the Plaintiffs and issue a declaratory judgment determining the constitutionality of I.C. § 35-49-3-3.

DISCUSSION

The Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 as a claim arising under 42 U.S.C. § 1983 and 28 U.S.C. § 2201.

Before reaching the merits of the Plaintiffs' claims as discussed in the Plaintiffs' motion, the Court is troubled by the claims as asserted by the Plaintiff Studio Art. Studio Art previously has been prosecuted under the Indiana statutes now alleged to be in violation of the United States Constitution, and raised the same constitutional challenges brought here in the Indiana state courts, and applied for a writ of certiorari on the state court's decision to the United States Supreme Court. *See Studio Art Theatre of Evansville* v. *State,* 530 N.E.2d 750 (Ind. App. 1989), *cert. denied*, 494 U.S. 1056, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990). Thus, there is question whether Studio Art may now bring those same claims before this Court under § 1983, or whether the state court's decision and U.S. Supreme Court's denial of certiorari in that matter precludes the present action by Studio Art.

First, the Court must consider the effects of the fact that the Indiana state courts both considered and ruled upon the merits of Studio Art's constitutional claims against the statutes at issue in the previous prosecution and appeal. Because the issues brought before the Court are identical to the issues presented before the state courts, Studio Art's pursuing these matters in this collateral proceeding may be barred by the doctrines of claim preclusion or *res judicata.*

Although the Court agrees that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights," *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), it is well settled that state court proceedings are preclusive in § 1983 litigation, and federal courts must afford the same respect to state court decisions and proceedings as-would the courts in the state where the decision is rendered. Indeed, Congress has specifically required federal courts to defer to state court judgments if courts of the State would do so:

> [J]udicial proceedings [of any state court] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ....

28 U.S.C. 1738.

Although the Plaintiffs argue that constitutional claims are entitled to a different standard, Congress did not except § 1983 actions from the application of this statute, and the Supreme Court has specifically held that the statute applies in full force to § 1983 actions. *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984); *Allen* v. McCurry, 449 U.S. 90 (1980) ("nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. 1738"); *see also*, *Pliska* v. *City of Stevens Point*, 823 F.2d 1168 (7th Cir. 1987); *Leal* v. *Krajewski*, 803 F.2d 332 (7th Cir. 1986). This rule applies to both issues actually litigated in the state court Proceeding and those which *could have* been litigated in that forum. *Migra*, 465 U.S. at 83-85; *Pliska*, 823 F.2d at 1172; *Leal*, 803 F.2d at 334. Thus, it is well-settled that *res judicata* and collateral estoppel may bar a claim under the United States Constitution which was or should have been raised in state court proceedings. *Green Assn.* v. *Daley*, 373 F.2d 1 (7th Cir. 1967), *cert.*

denied, 387 U.S. 932. Both *res judicata* and collateral estoppel generally are considered affirmative defenses and must be raised by the defendants. *Blankner* v. *City of Chicago*, 504 F.2d 1037 (7th Cir. 1974). The Defendants in this action have not raised these issues.

The reasons for precluding relitigation of issues previously decided by other courts extend beyond merely protecting the parties from being prejudiced, however, especially when one attempts to relitigate a state court judgment in the federal courts. When it appears that a federal court is asked to hear issues previously determined by a state court, the court also must be aware that "sensitive questions touching the relations between the federal government and those tattered quasi-sovereigns, the states, are involved" and ensure that appropriate comity is observed. *Wood* v. *Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991) (citing *Thomas* v. *Indiana*, 910 F.2d 1413, 1415-16 (7th Cir. 1990)). For that reason, the courts have broad discretion in raising and considering whether previous adjudication precludes litigation before them. *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 793 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 130 L.Ed.2d 642; *Salahuddin* v. *Jones*, 992 F.2d 447, 449 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 229 (1993); *Russell* v. *SunAmerica Securities, Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992); *Fassett* v. *Delta Kappa Epsilon*, 807 F.2d 1150, 1156 (3rd Cir. 1986). Furthermore, the Court raised the issue *sua sponte* early in this matter to avoid any question of fairness or prejudice to the parties.

In applying 28 U.S.C. § 1738, this Court must look to Indiana law to determine the preclusive effect of the state court proceedings. *Leal*, 803 F.2d at 334.

Under Indiana law, a final judgment is conclusive as to all matters which were determined or which could have been litigated in the previous adjudication. *Kimberlin* v. *DeLong*, 637 N.E.2d 121, 125 (Ind. 1994); *Sullivan* v. *American Casualty Co.*, 605 N.E.2d 134, 137 (Ind. 1992); *State Exchange Bank of Culver* v. *Teague*, 495 N.E.2d 262,

266 (Ind. App. 1986); *Lear Resources, Inc.* v. *Uland*, 485 [N.E.2d 134, 137 (Ind. App. 1985). A party is precluded from relitigating an issue where: (1) The former court had jurisdiction; (2) The matter now in issue was or could have been determined in the former suit; (3) The former suit was between the same parties or their privies; and, (4) The prior suit had a final judgment entered on the merits. *Popp* v. *Hardy*, 508 N.E.2d 1282, 1286 (Ind. App. 1987).

Here, there is no dispute that the Vanderburgh Circuit Court had jurisdiction in the prior adjudication. Likewise, Studio Art does not dispute that it *raised* the issue of the constitutionality of the obscenity statute in the Circuit Court, Indiana Court of Appeals, and Indiana Supreme Court. (Plaintiff's Brief in Response to the District Court's Show Cause Order at p. 16).

Studio Art does contend, however, that it did not have a full and fair opportunity to litigate the issue of the constitutionality of the obscenity statute, because neither the Circuit Court or Court of Appeals specifically held that the obscenity statute was constitutional. The Court can see no merit in this argument, as both the Circuit Court and Court of Appeals heard argument on the issue, and both specifically held that the Indiana RICO statute, using the obscenity statute as a predicate offense, was not a violation of the Plaintiff's rights under the first and fourteenth amendments to the United States Constitution. It strains the bounds of logic to argue that the courts were not also holding that the obscenity statute is constitutional, where they in fact held that using the obscenity statute as a predicate offense under the RICO statute was constitutional. The mere fact that the state courts did not specifically state that the obscenity statute is constitutional does not impact the parties having a full and fair opportunity to litigate the issue, where they did in fact argue the issue and the courts found against Studio Art. This is especially true where, as here, the court of appeals *did* find

that "Studio Art argues on a broad front that IND.CODE 35-45-6-2 and IND.CODE 3549-3-3 are unconstitutional", and "claims that these statutes violate the first, fifth, and fourteenth amendments to the United States Constitution . . ." and dismissed these arguments as meritless. *Studio Art*, 530 N.E.2d at 752.

The Court similarly is not convinced that the application of the doctrine of collateral estoppel would be otherwise unfair to Studio Art or a "direct derogation of the obligations of this Court to enforce and protect federal constitutional rights." (Plaintiff's Brief at p. 17). Studio Art pursued its constitutional claims in this action through the Indiana State courts. The State courts decision in this matter — that the obscenity statute is constitutional — was ultimately offered for review to the United States Supreme Court, which declined to hear the claim.

The Plaintiff argues that the Supreme Court's decision in *Allen* v. *McCurry* recognizes three exceptions to the general rule that *res judicata* and collateral estoppel bar relitigation of constitutional claims. However, the *Allen* Court explicitly stated:

> Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.

449 U.S. at 101.

This is the only exception to barring relitigation of constitutional issues recognized in *Allen:*

> [T]he Court's view of § 1983 in [*Monroe* v. *Papp*, 365 U.S. 167 (1960)] lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.

Id.

Like this Court, the Indiana courts have a constitutional obligation to uphold the Constitution of the United States and the entire body of federal law, including Section 1983. *Stone* v. *Powell*, 428 U.S. 465, 493-494 n. 35 (1975) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816)). Without some indication that the state courts are refusing to meet this obligation, the doctrines of *res judicata* and collateral estoppel apply to an attempt to relitigate issues previously decided by those courts. As a result, the Court must find that Studio Art had an opportunity to — and actually did — present the *exact* same claims as it now attempts to bring before this Court and is barred by the doctrine of issue preclusion from relitigating its constitutional claim.

Turning to the Plaintiff William Montrose, it is clear that he was not an actual party to Studio Art's criminal conviction. Under the doctrines of preclusion, however, he is in privity with Studio Art to such a degree that his relitigation of the issue of the constitutionality of the obscenity statute is barred.

Although Montrose was dismissed as a criminal defendant in the state court proceedings, he is the president and general manager of Studio Art. (Defendants' Ex. I). Furthermore, Montrose undoubtedly had a strong interest in the former suit, and an opportunity to participate in Studio Art's defense and assertion of its constitutional rights. *See Tofany* v. *NBS Imaging Systems, Inc.*, 597 N.E.2d 23, 28 (Ind. App. 1992) ("When a person owns most or all of the shares of a corporation and controls the affairs of the corporation, it is presumed that in any litigation involving the corporation, the individual has a sufficient commonality of interest to be considered a privy") (subsequent case history omitted). Under these circumstances, the Court must find that the Plaintiff Montrose is similarly precluded from bringing his current claims.

After considering the foregoing, as well as the relevant case and statutory law, the Court hereby DISMISSES the Plaintiffs' Complaint. Accordingly, the Plaintiffs' Motion for Partial Summary Judgment is DENIED AS MOOT.

This is a final judgment of the Court.

IT IS SO ORDERED this 18th [handwritten] day of ~~April~~ May [handwritten], 1995, at Evansville, Indiana.

/s/ GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: All Counsel of Record

APPENDIX G

FINDINGS OF FACT

(State of Indiana — Vanderburgh County Circuit Court)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT & CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT, INC., STUDIO ART THEATRE OF EVANSVILLE, IND., A.M.W. INVESTMENTS, INC., WILLIAM MONTROSE — CAUSE NO. 5436)

1. That on June 4, 1987, the State of Indiana, County of Vanderburgh, filed an Amended Indictment charging World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc., Studio Art Theatre of Evansville, Inc., A.M.W. Investments, Inc. and William Montrose with a violation of I.C. 35-45-6-2(a)(3) ("Corrupt Business Influence").

2. That the charged violation of I.C. 35-45-6-2(a)(3) was based upon nineteen (19) predicated acts prohibited by I.C. 35-49-3-3(3).

3. That on October 19, 1987, the State of Indiana, County of Vanderburgh, moved to dismiss the Amended Indictment against World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc., A.M.W. Investments, Inc. and William Montrose.

4. That on October 19, 1987, the Vanderburgh Circuit Court granted the motion to dismiss.

5. That on October 19, 1987, the State of Indiana, County of Vanderburgh, moved to dismiss all of the predicated acts with the exception of predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15).

6. That on October 19, 1987, the Vanderburgh Circuit Court granted the motion to dismiss all of the predi-

cated acts with the exception of predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15).

7. That on October 19, 1987, Studio Art Theatre of Evansville, Inc. became the sole remaining defendant in this proceeding.

8. That on October 19, 1987, in the trial of this cause, the State of Indiana, County of Vanderburgh, filed a Stipulation of Facts, there being no objection by the defendant, said Stipulation was admitted into evidence.

9. That the Studio Art Theatre of Evansville, Inc. is an Indiana corporation lawfully incorporated on September 18, 1978 pursuant to the Indiana General Corporation Act.

10. That the Studio Art Theatre of Evansville, Inc. has been incorporated to transact any and all lawful business for which corporations may be incorporated under the Indiana General Corporation Act since the date of September 18, 1978.

11. That the Studio Art Theatre of Evansville, Inc. has as its resident agent CT Corporation System, located at 101 Merchants Bank Building, Indianapolis, Indiana, 46204.

12. That the President of the Studio Art Theatre of Evansville, Inc. is William Montrose.

13. That the Studio Art Theatre of Evansville, Inc. is the owner and operator of a retail adult entertainment business, at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

14. That the Studio Art Theatre of Evansville, Inc. was the owner and operator of said business on the 17th day of December, 1985, the 19th day of December, 1985, and the 6th day of February, 1986, and was, between the periods of November 11, 1985 and February 11, 1986, engaged in the business of retail sales of sexually explicit and other materials.

15. That the Studio Art Theatre of Evansville, Inc. did knowingly have in its possession and did knowingly display for sale to its customers at its business premises at 2113 W. Franklin Street, in the City of Evansville, State of Indiana, the video cassette film entitled "Teenage Runaway".

16. That the film, "Teenage Runaway", was knowingly possessed and knowingly displayed for sale on December 17, 1985 during the ordinary course of business of the Studio Art Theatre of Evansville, Inc. as it was conducting its business activities on December 17, 1985.

17. That the Studio Art Theatre of Evansville, Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, the video cassette film entitled "Seduction of Lana Shore".

18. That the film, "Seduction of Lana Shore" was knowingly possessed and was knowingly displayed for sale on December 19, 1985 during the ordinary course of business of the Studio Art Theatre of Evansville, Inc. as it was conducting its business activities on December 19, 1985.

19. That the Studio Art Theatre of Evansville, Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled "Boys In A Bath", at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, on February 6, 1986, during the ordinary course of business.

20. That the Studio Art Theatre of Evansville, Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled "Geisha's Slave" at its business premises at 2113 W. Franklin Street, in the City of Evansville, County of

Vanderburgh, State of Indiana on February 6, 1986, during the ordinary course of business.

21. That the said films, "Teenage Runaway", "Seduction of Lana Shore", "Boys In A Bath" and "Geisha's Slave", contain depictions of sexual conduct, nudity, and sexual excitement.

22. That the United Methodist Church is located at 2201 W. Illinois, in the City of Evansville, County of Vanderburgh, State of Indiana.

23. That Simpson United Methodist Church is a church used for religious services by members of the Methodist faith.

24. That St. Boniface Catholic Church is located at 418 N. Wabash, in the City of Evansville, County of Vanderburgh, State of Indiana.

25. That St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith.

26. That St. Boniface Catholic School is located at 2031 W. Michigan, in the City of Evansville, County of Vanderburgh, State of Indiana.

27. That St. Boniface Catholic School is a school for seventh and eighth grade school children which operates its school year from the Tuesday following Labor Day through the end of the first week of June for each school year.

28. That Simpson United Methodist Church, St. Boniface Catholic Church and St. Boniface Catholic School were so located at all times relevant to this proceeding.

29. That State's Exhibit 5 is an accurate copy of the quarter sheets which are official records of the City Engineers Office for the City of Evansville.

30. That the pink area of said map is an accurate depiction of the location of the business premises of the Studio Art Theatre of Evansville, Inc.

31. That the smaller green area of said map marked Simpson U.M.C. accurately depicts the location of Simpson United Methodist Church.

32. That the larger green area of said map marked St. Boniface Church accurately depicts the location of St. Boniface Catholic Church and St. Boniface Catholic School with St. Boniface Catholic School occupying the western portion of said area and St. Boniface Catholic Church representing the eastern portion of said area.

33. That said map is accurate in all its relative locations, structures and property lines to the scale set out thereon.

34. That the distances and relative locations of each item set out on said map were present in the positions indicated thereon for all times relevant to this proceeding.

35. That the State of Indiana, County of Vanderburgh, has charged by way of an Amended Indictment in four (4) counts, that Studio Art Theatre of Evansville, Inc. has violated I.C. 35-49-3-3(3), to-wit:

> A person who knowingly or intentionally:
>
> (3) sells or displays for sale to any person matter that is harmful to minors within five hundred feet (500') of the nearest property line of a school or church;
>
> commits a Class A misdemeanor.

36. That the above four (4) counts charged are as follows:

a. That the Studio Art Theatre of Evansville, Inc. did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five

hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

b. That the Studio Art Theatre of Evansville, Inc. did on December 19, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in in violation of I.C. 35-49-3-3(3).

c. That the Studio Art Theatre of Evansville, Inc. did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys In A Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

d. That the Studio Art Theatre of Evansville, Inc. did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: "Geisha's Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church, all in violation of I.C. 35-49-3-3(3).

37. That the State of Indiana, County of Vanderburgh, has charged by way of an Amended Indictment that the above four (4) counts are predicated acts twelve (12), thirteen (13), fourteen (14), and fifteen (15), respectively, all in violation of I.C. 35-45-6-2(a)(3), to-wit:

(a) A person:

(3) Who is employed by or associated with an enterprise, and who knowingly or

intentionally conducts or otherwise participates in the activity of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C Felony.

CONCLUSIONS OF LAW

1. The law is with the State of Indiana and against the defendant.

2. The Circuit Court of Vanderburgh County, State of Indiana, has jurisdiction in in this matter.

3. Legislative acts are afforded a presumption of constitutionality, with the burden of rebutting that presumption upon the challenger with all reasonable doubts resolved in favor of the act's constitutionality. *Whitewater Valley Canoe* v. *Franklin County Commissioners* (Ind. App. 1 Dist. 1987), ___ IN ___, 507 N.E.2d 1001, 1004.

4. The films "Teenage Runaway", "Seduction of Lana Shore", "Boys In A Bath" and "Geisha's Slave" are obscene in that taking each as a whole they appeal to a minor's prurient interest in sex, are patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and lack serious literary, artistic, political or scientific value for minors. *Miller* v. *California* (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed.2d 419.

5. The Studio Art Theatre of Evansville, Inc. is guilty of four (4) counts of I.C. 35-49-3-3(3) in that the business premises of Studio Art Theatre of Evansville, Inc. where the films "Teenage Runaway" and "Seduction of Lana Shore" were displayed and where the sale of the films "Boys In A Bath" and "Geisha's Slave" were made is located within five hundred feet (500") of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church.

6. Indiana's Racketeer Influenced and Corrupt Organization Act, as it pertains to predicate offenses of obscenity, does not violate the First and Fourteenth Amendments to the United States Constitution. *4447 Corp.* v. *Goldsmith* (1987), ___ IN ___, 504 N.E.2d 559, 564.

7. Prior convictions for the predicate offenses are not required to sustain a conviction for corrupt business influence. *Id.* at 566.

8. The Studio Art Theatre of Evansville, Inc. is guilty of corrupt business influence, a violation of I.C. 35-45-6-2(a)(3).

/s/ William H. Miller, Judge
Vanderburgh Circuit Court

APPENDIX H

OPINION
[*Reported at* 530 N.E.2d 750]

(State of Indiana — Court of Appeals — First District)

(November 22, 1988)
(Rehearing Denied January 31, 1989)

(STUDIO ART THEATRE OF EVANSVILLE, INC., Defendant-Appellant, v. STATE of Indiana, Plaintiff-Appellee — No. 82A01-8805-CR-152)

NEAL, Judge.

STATEMENT OF THE CASE

Defendant-appellant, Studio Art Theatre of Evansvile, Inc. (Studio Art), appeals its conviction under the Indiana Racketeer Influenced & Corrupt Organizations Act (RICO), IND.CODE 35-45-6-2(a)(3).

We affirm.

STATEMENT OF THE FACTS

Studio Art was charged by amended indictment with 19 specifications of violation of the Indiana RICO statute, IND.CODE 35-45-6-2, all of which, except specifications 12, through 15, were dismissed. Those remaining specifications charge Studio Art as follows:

> (12) did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3)
>
> (13) did on December 19, 1985 knowingly display for sale to any person matter that is

harmful to minors, to-wit: "Seduction of Lana Shore" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(14) did on February 6, 1986 knowingly sell to Gerald Windgerter matter that is harmful to minors, to-wit: the movie "Boys in a Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, 35-49-3-3(3).

(15) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Guishe's [*sic*] Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

Record at 138-139.

IND.CODE 35-45-6-2(a) states:

A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an

interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

The RICO charge was predicated upon IND.CODE 35-49-3-3 which reads as follows:

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor.

Upon stipulated facts the trial court found that Studio Art knowingly had in its possession and displayed for sale the video cassette films set forth in specifications 12 through 15, and that the films depicted sexual conduct, nudity, and sexual excitement. The trial court found that the films were offered for sale within 500 feet of the churches and schools charged in the indictment in violation of IND.CODE 35-49-3-3(3), supporting the RICO charge.

ISSUES

On appeal the appellant claims numerous errors, which we restate as follows:

I. Whether the RICO statute is unconstitutional.

II. Whether the trial court lacked jurisdiction because the amended indictment was not resubmitted to the grand jury.

III. Whether the trial court erred in interpreting IND.CODE 35-49-3-3(3) regarding the method of measuring the 500 foot distance set forth therein.

DISCUSSION AND DECISION

ISSUE I: *Constitutionality*

Studio Art argues on a broad front that IND.CODE 35-45-6-2 and IND.CODE 35-49-3-3 are unconstitutional. Studio Art claims that these statutes violate its rights under the first, fifth and fourteenth amendments of the United States Constitution and art. I § 9 of the Indiana Constitu-

tion. It claims that the statutes are overbroad, vague, violate equal protection, and amount to the taking of its property without just compensation. It concludes with the claim that the statutes have an impermissible chilling effect on its first amendment rights.

The cases of *4447 Corp.* v. *Goldsmith* (1987), Ind., 504 N.E.2d 559; and *State* v. *Sappenfield* (1987), Ind.App., 505 N.E.2d 504, *trans. denied*, concerned the relation of the State's obscenity statute, IND.CODE 35-49-1-1 to -3-4, to the RICO statute. Those cases held that the RICO statute is not unconstitutional as applied to the obscenity statute. A petition for certiorari on *4447 Corp.* is currently pending in the Supreme Court of the United States. Discussion in those cases specifically addressed the first and fourteenth amendments and the argument made that the statutes were unconstitutionally vague. The same arguments are presented here, and in addition thereto, other remote constitutional arguments are presented which hinge on first and fourteenth amendment rights.

Because these matters have been presented to and ruled upon by our supreme court, we do not deem it necessary to discuss them further. If the reader so desires, he is directed to those cases for further edification.

ISSUE II: *Amended Indictment*

[1] The original indictment, signed by the grand jury foreman and the prosecuting attorney reads in part:

> The Grand Jurors for the County of Vanderburgh and State of Indiana, upon their Oaths, present and charge that:
>
> World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.
>
> Studio Art Theatre of Evansville, Inc.
>
> A. M.W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 AND 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE INC. DID PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

Record at 33. There followed 28 more specifications utilizing a format similar to that set forth in specification number one. The trial court permitted the State to amend the indictment to insert the word "knowingly" in the indictment as follows:

The Grand Jurors for the County of Vanderburgh and State of Indiana, upon their Oaths, present and charge that:

World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.

Studio Art Theatre of Evansville, Inc.

A. M.W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 AND 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE INC. DID *KNOWINGLY* PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2. (Our emphasis.)

Record at 137.

The amended indictment, which included only 19 specifications, was not resubmitted to the grand jury

but was signed only by the prosecuting attorney. Before final disposition, the amended indictment was dismissed as to all defendants except Studio Art, and eventually, all specifications except 12 through 15 were dismissed as to it. Studio Art moved to dismiss the amended indictment on the grounds that the grand jury had been discharged and had not acted upon it. Denial of that motion is assigned as error.

IND.CODE 35-34-1-5 governing amendments reads as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
>
> (1) any miswriting, misspelling, or grammatical error;
>
> (2) Any misjoinder of parties defendant or offenses charged;
>
> (3) The presence of any unnecessary repugnant allegation;
>
> (4) The failure to negate any exception, excuse, or provision contained in the statute defining the offense;
>
> (5) The use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;
>
> (6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
>
> (7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;

(8) The failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or

(9) Any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) Thirty [30] days if the defendant is charged with a felony; or

(2) Fifteen [15] days if the defendant is charged only with one or more misdemeanors;

before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of

> the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

As seen, the State must establish that Studio Art knowingly engaged in the conduct proscribed under the RICO statute. While the original indictment omitted the word knowingly from the capitalized portion of the indictment, each specification used the word, indicating the element required by the statute. Thus, any defect is merely a choice of organization selected by the draftsman. It is one of form, not substance. If a defense under the original indictment would be equally applicable to the indictment in its amended form, no substantial prejudice has occurred. *Graves* v. *State* (1986), Ind., 496 N.E.2d 383. *See also Pennington* v. *State* (1988), Ind., 523 N.E.2d 414.

Under IND.CODE 35-34-1-5(a) an indictment may be amended on motion by the prosecuting attorney at any time because of any immaterial defect for:

> (5) the use of alternative or disjunctive allegations as to the acts, means, *intents*, or results charged.
>
> * * *
>
> (9) any other defect which does not prejudice the substantial rights of the defendant. [Our emphasis.]

That section does not state a requirement that the amended indictment be resubmitted to the grand jury. In fact, under paragraph (b) it is stated that when the indictment is amended it shall be signed by the prosecuting attorney. Further, under paragraph (b) the indictment may be amended as to substance, and even an amendment of that nature does not require resubmission to the grand jury. Clearly then, under paragraph (a) which addresses immaterial defects and permits amendments to be made at any time, even during tiral [*sic*], the legislature has not evidenced an intent that it desires that this case be resubmitted to the grand jury. Such action would be patently impractical. Accordingly,

in *McLoud* v. *State* (1983), Ind.App., 452 N.E.2d 1053, an unsigned amended information filed during a trial was held to be valid.

Studio Art relies primarily on *Walker* v. *State* (1968), 251 Ind. 432, 241 N.E.2d 792. In that case, the defendant was charged with murder, which could be brought only by a grand jury indictment. The trial court sustained a motion to quash the original indictment. At that time, Burns Indiana Statutes 9-113, then in effect, required in such instance that the case be resubmitted to the grand jury for further action. It was not, and our supreme court held that such failure to follow the statute was fatal, preventing the trial court from acquiring jurisdiction. *Walker* is not authority here for the charge is not murder, and the controlling statute does not require that the indictment be resubmitted to the grand jury.

ISSUE III: *Method of Measuring Distance*

Finally, Studio Art argues the trial court erred in construing IND.CODE 35-49-3-3(3) regarding the method of measuring the distance between a place selling matter harmful to minors and a "school or church." It seems to argue that the proper method to determine the distance would be to measure the walking distance along the streets between each location. In *Taylor Drug Stores, Inc.* v. *Indiana Alcoholic Beverage Commission* (1986), Ind.App., 497 N.E.2d 932, where the statutory proscription was directed at the sale of liquor within 200 feet of a church, we held that straight-line measurement was the appropriate method of determining the distance between the two points. The policy in the alcoholic beverage statute and the policy here is identical. We hold that *Taylor* controls. The trial court correctly applied the statute.

For the above reasons, this cause is affirmed.

JUDGMENT AFFIRMED.

RATCLIFF, C.J., and CONOVER, P.J., concur.

APPENDIX I

ORDER

(State of Indiana — Supreme Court)

(Dated September 21, 1989)

(STUDIO ART THEATRE OF EVANSVILLE, INC., v. STATE OF INDIANA — Cause Number 82A01-8805-CR-00152; LOWER CAUSE 5436)

KLEIN, LEE H.
8252 E. LANSING RD. #101
DURAND, MI 48429-0000

You are hereby notified that the SUPREME COURT has on this day 9/21/89:

> APPELLANT'S PETITION TO TRANSFER IS HEREBY DENIED WITHOUT OPINION. RANDALL T. SHEPARD, CHIEF JUSTICE; SHEPARD, C.J. AND DEBRULER VOTE TO GRANT TRANSFER.

WITNESS my name and the seal of said Court,
this 21ST day of SEPTEMBER, 1989

/s/ Dan Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX J

ORDER DENYING PETITION FOR WRIT OF CERTIORARI
[*Reported at* 494 U.S. 1056]

(United States Supreme Court)

(Dated March 26, 1990)

(Studio Art Theatre of Evansville, Inc., Petitioner v Indiana — No. 89-847)

494 US 1056, 108 L Ed 2d 763, 110 S Ct 1523.

Petition for writ of certiorari to the Court of Appeals of Indiana, First District, denied.

Same case below, 530 NE2d 750.

APPENDIX K

ORDER

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Dated February 2, 1994)

(STUDIO ART THEATRE OF EVANSVILLE, INC., and WILLIAM MONTROSE, Plaintiffs, vs. CITY OF EVANSVILLE, INDIANA, ART GANN, as Chief of Police of the Evansville Police Department, STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana, and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

This matter comes before the Court on Defendants Levco and Carter's Motion for Further Enlargement of Time filed 31 January 1994. This is the fifth extension of time sought by these defendants. While the Court is appreciative of the timely filing of motions for extensions of time, it must note that it would have preferred to have granted a larger extension of time initially. Furthermore, motions should contain specific reasons supporting good cause for an extension. Here, no cause is given other than the statement that more time is needed. Nevertheless, in the interests of justice, one more extension will be permitted.

This is the last extension of time which will be permitted in regards to this brief barring the severest of circumstances. Since 5 February 1994 is a Saturday, the Court will only grant an extension to Friday 4 February 1994. Defendants are reminded that the brief must be filed marked by that date and that neither the Federal Rules of Civil Procedure nor the Local Rules for the Southern District of Indiana provide for filing on the date of mailing. If Defendants Levco and Carter fail to

file a brief on or before 4 February 1994 they will have forfeited their right to file an answer to the motion for partial summary judgment. In that event, Defendants City of Evansville and Gann shall file their answer brief, if any, on or before 18 February 1994.

The Court being duly advised, it is

ORDERED that Defendants Levco and Carter shall file their answer brief, if any, on or before 4 February 1994, and

ORDERED that Defendants City of Evansville and Gann shall file their answer, if any, on or before 18 February 1994.

DONE this 2nd day of February 1994 in Evansville, Indiana

/s/ GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Distribution to Counsel of Record

APPENDIX L

ORDER

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Dated June 8, 1994)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, -vs- CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

COMES NOW the plaintiffs, by counsel, and file Motion to Assign Time for Filing of Plaintiffs' Reply Brief; and the Court, being duly and sufficiently advised in the premises, NOW GRANTS said Motion.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs are hereby given to and including June 24, 1994, within which to file a Reply Brief in response to the briefs filed by by the defendants, Stanley M. Levco and Pamela Carter.

[handwritten]:
The Def's City of Evansville and Art Gann have waived their opportunity to file a brief and may not now file any such brief.

/s/ [*Illegible*]
[handwritten]: *Mag* JUDGE, U.S. DISTRICT COURT

APPENDIX M

AMENDED INDICTMENT FOR: CORRUPT BUSINESS INFLUENCE

(State of Indiana — Vanderburgh County Circuit Court)

(Filed June 4, 1987)

(STATE OF INDIANA vs WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.N.W. INVESTMENTS, INC. AND WILLIAM MONTROSE — CAUSE NO. 5436)

The State of Indiana, Vanderburgh County, ss:

The Grand Jurors for the County of Vanderburgh and State of Indiana, upon their Oaths, present and charge that:

World Wide Business Management and Consultants, Inc. d/b/a World Wide Business Management, Inc.
Studio Art Theatre of Evansville, Inc.
A.M.W. Investments, Inc. and William Montrose

BETWEEN 11-11-85 AND 2-11-86 BEING ASSOCIATED WITH AN ENTERPRISE; TO-WIT: THE STUDIO ART THEATRE OF EVANSVILLE, INC. DID KNOWINGLY PARTICIPATE IN THE ACTIVITIES OF THAT ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, TO-WIT:

(1) did knowingly exhibit to Larry Cannon on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 39-45-3-2

(2) did knowingly exhibit to Larry Cannon on November 18, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(3) did knowingly exhibit to Larry Cannon on February 11, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(4) did knowingly exhibit to David Davies on December 19, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(5) did knowingly exhibit to Gerald Wingerter on November 11, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(6) did knowingly exhibit to Gerald Wingerter on February 11, 1985 [*sic*] an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(7) did knowingly exhibit to Tom Wallis on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(8) did knowingly exhibit to Rodney Buchanan on December 20, 1985 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(9) did knowingly exhibit to Bertha Weekley on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(10) did knowingly exhibit to Nancy Davis on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(11) did knowingly exhibit to Joyce Below on February 10, 1986 an obscene performance, to-wit: an act of female masturbation, all in violation of I.C. 35-49-3-2.

(12) did on December 17, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: the movie "Teenage Runaway" within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(13) did on December 19, 1985 knowingly display for sale to any person matter that is harmful to minors, to-wit: "Seduction of Lana Shore" within five hundred (500)

feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(14) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Boys in a Bath", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, 35-49-3-3(3).

(15) did on February 6, 1986 knowingly sell to Gerald Wingerter matter that is harmful to minors, to-wit: the movie "Guishe's [*sic*] Slave", within five hundred (500) feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson's United Methodist Church, all in violation of I.C. 35-49-3-3(3).

(16) did on December 17, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: "Teenage Runaway", all in violation of I.C. 35-49-3-1(2).

(17) did on December 19, 1985 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Seduction of Lana Shore", all in violation of I.C. 35-49-3-1(2).

(18) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: the movie "Boys in a Bath", all in violation of I.C. 35-49-3-1(2).

(19) did on February 6, 1986 knowingly distribute to Gerald Wingerter obscene matter, to-wit: "Guisha's [*sic*] Slave", all in violation of I.C. 35-49-3-1(2).

AND ALL IN VIOLATION OF I.C. 35-45-6-2(a)(3).

Contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Robert J. Pigman
PROSECUTING ATTORNEY

CLASS: C Felony
PENALTY: 2-8 Years

WITNESSES ATTACHED

AMENDED INDICTMENT FOR:
CORRUPT BUSINESS INFLUENCE

/s/ Robert J. Pigman
~~Foreman~~

Gerald Wingerter, EPD
Larry Cannon, EPD
David Davies, EPD
William R. Jeffers, Vanderburgh County Surveyor's Office
Tom Wallis, VCSD
Rodney Buchanan, VCSD
Bertha Mae Weekley, EPD
Nancy Davis, EPD
Joyce Below, EPD
Jim Fanagan, SIGECO
John Love, Old National Bank of Evansville
420 Main Street
Jim McIntyre, City of Evansville Water Department
Civic Center Complex
Cathy Ann Reel
Corliss A. Waitman, 72 Herndon Drive
Diedre L. Vierra, 2128 S.E. Riverside
William Smothers, Studio Art Theatre of Evansville
Laurie Fitz, Box 110 East Hein Road, Chandler, IN
Edward Thomas, 826 Madison
Kristine Holder, 501 Covert
Peggy Sue Fulkerson
John Crouch
Michael Whitney

APPENDIX N

COMPLAINT FOR PERMANENT INJUNCTION AND DECLARATORY RELIEF

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Filed December 28, 1990)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, -vs- CITY OF EVANSVILLE, INDIANA; RAY HAMNER, as Chief of Police of the Evansville Police Department; ROBERT J. PIGMAN, as Prosecutor of the County of Vanderburgh, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

Plaintiffs state their claims for relief as follows:

I.

JURISDICTION

1. This is a civil action whereby plaintiffs pray for a permanent injunction enjoining the defendants from enforcement of certain Indiana statutes (I.C. 35-45-6-2, *et seq.* — Indiana Racketeer Influenced Corrupt Organizations Act, hereinafter "RICO"), utilizing as predicate acts thereunder alleged violations of I.C. 35-49-3-3, a portion of the Indiana Obscenity Statute, on the grounds that said statutes are unconstitutional as written and/or in their application and threatened application to the plaintiffs in their activities described below. Further, plaintiffs pray for declaratory judgment to determine the unconstitutionality of said statutes of the State of Indiana as written and/or in their application and threatened application to them.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions pre-

sented by virtue of 28 U.S.C. Section 1331 as well as 28 U.S.C. Section 1343(3), which provides, in pertinent part, that the district courts shall have original jurisdiction over any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .

Institution of this suit is further predicated on 42 U.S.C. Section 1983, which provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure as well as 28 U.S.C. Section 2201, which provides, in pertinent part, that:

> ". . . any Court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."

The jurisdiction of the Court to grant injunctive relief is conferred by 28 U.S.C. Section 2202, which provides:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any

adverse party whose rights have been determined by such judgment."

3. No other matter, civil or criminal, is pending in any state court involving any of the plaintiffs regarding the activities and events at issue here.

II.

PARTIES

4. That the plaintiff, STUDIO ART THEATRE OF EVANSVILLE, INC. (hereinafter "Studio Art"), is an Indiana Corporation with its principal place of business located in Vanderburgh County, Indiana.

5. That the plaintiff, WILLIAM MONTROSE, is a citizen and resident of the State of Indiana, residing in Evansville, Vanderburgh County, Indiana, and serves as President and general manager of the plaintiff, Studio Art.

6. That none of the plaintiffs are currently the subject of any criminal charges pertaining to the issues related herein.

7. That the defendant, CITY OF EVANSVILLE, INDIANA, is a municipal corporation organized under the statutes of the State of Indiana and is located in Vanderburgh County, Indiana.

8. That the defendant, RAY HAMNER, is named in his official capacity as the Chief of Police of the Evansville Police Department, having the authority conferred upon him by the statutes of the State of Indiana, and the ordinances of the City of Evansville, Indiana, to supervise the operations of the Evansville Police Department.

9. That the defendant, ROBERT J. PIGMAN, is named in his official capacity as the duly elected, qualified and serving Prosecutor of Vanderburgh County, Indiana, having the prosecutorial authority conferred upon him by the Constitution and statutes of the State of Indiana, which include, among other things, the administration and implementation of the criminal statutes of the State

of Indiana within Vanderburgh County, Indiana, and the authority to determine which, and in what context, criminal statutes are to be deemed violated, enforced, and the authority to file informations initiating criminal proceedings within Vanderburgh County, Indiana.

10. That the defendant, LINLEY PEARSON, is named in his official capacity as Attorney General of the State of Indiana, having the authority conferred upon him by the Constitution and the statutes of the State of Indiana and to act under color of authority of the same, to uphold the constitutionality of the criminal and quasi-criminal statutes of the State of Indiana.

11. That the individual defendants are joined in their official capacities only so as to make enforceable upon them, their agents, servants and employees, the hereinafter sought permanent injunctions, declaratory relief and such other orders of this Court as may be made.

III.

FACTUAL ALLEGATIONS

12. Plaintiff, Studio Art, is primarily engaged in the sale of presumptively protected, non-obscene video tapes, books and magazines, and in the on premises exhibition of non-obscene live entertainment and motion picture films, a significant portion of which depicts, describes and/or represents nudity and/or acts of sexual conduct by consenting adults, at a fully enclosed bookstore, theatre and entertainment complex located at 2113 West Franklin Street, Evansville, Vanderburgh County, Indiana. Plaintiff, Studio Art, has offered and wishes to continue to offer to the interested adult public the sale of video tapes, books and magazines as well as on premises viewing of live stage productions and motion picture films which contain depictions, descriptions and/or representations as aforesaid.

13. That at times relevant hereto, the defendants and their agents, servants, employees, deputies, officers and

other persons acting under their direction and control have acted and threatened to continue to act under color of law to arrest and prosecute persons, including the plaintiffs, for alleged violations of I.C. 35-45-6-2, RICO, utilizing as predicate acts thereunder alleged violations of I.C. 35-49-3-3.

14. I.C. 35-45-6-2 reads as follows:

"Sec. 2. (a) A Person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony."

15. That pursuant to the provisions of I.C. 35-45-6-1, a violation of the provisions of I.C. 35-49-3 constitute predicate acts of racketeering activity prohibited by I.C. 35-45-6-2.

16. I.C. 35-49-3-3 reads, in pertinent part, as follows:

"Sec. 3. A Person who knowingly or intentionally:

(1) disseminates matter to minors that is harmful to minors;

(2) displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) *sells or displays for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church;*

(4) engages in or conducts a performance before minors that is harmful to minors;

(5) engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

commits a Class A misdemeanor." (Emphasis added.)

17. I.C. 35-49-2-2 reads as follows:

"A matter or performance is harmful to minors for purposes of this article if:

(1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;

(2) Considered as a whole, it appeals to the prurient interest of sex of minors;

(3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and

(4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors."

18. That between 1970, to and including the present time, the plaintiff, Studio Art, has operated an adult enter-

tainment complex at 2113 West Franklin Street, Evansville, Vanderburgh County, Indiana, and offered to the adult public materials in the form of motion picture films, video tapes, books, magazines and live entertainment.

19. That the subject motion picture films, video tapes, books, magazines and live entertainment include descriptions, depictions and/or representations of nudity and/or sexual conduct as those terms are utilized in I.C. 35-49-2-2. However, minors have at no time had visual, auditory or physical access to said materials or performances.

20. That portions of the premises of the Studio Art adult entertainment complex lie within five hundred (500) feet of the nearest property line of Simpson United Methodist Church, St. Boniface Catholic School and St. Boniface Catholic Church if measured with a straight line disregarding existing buildings and other property structures.

21. That in 1985 and 1986, the plaintiffs and sundry other persons were then engaged in the sale of video tapes, books, magazines and the showing of motion pictures and live dance entertainment at Studio Art, were arrested on various occasions by the Evansville Police Department for alleged violations of I.C. 35-49-3-3 and I.C. 35-49-3-2, and the plaintiff, Studio Art, was thereafter indicted for an alleged violation of I.C. 35-45-6-2, utilizing as predicate acts an alleged violation of I.C. 35-49-3-3(3). Charges were subsequently dismissed by Robert J. Pigman, Prosecuting Attorney for Vanderburgh County, Indiana, against all persons arrested, excepting the plaintiff, Studio Art, who was prosecuted and convicted of a violation of I.C. 35-45-6-2, utilizing as predicate acts thereunder the alleged violation of I.C. 35-49-3-3(3). The plaintiff, Studio Art, has unsuccessfully appealed its conviction to the Indiana Court of Appeals and the Indiana Supreme Court.

22. That the defendant, City of Evansville, Indiana, through the Evansville Police Department and its mem-

bers, upon direction from Robert J. Pigman, Prosecuting Attorney for Vanderburgh County, Indiana, have threatened to prosecute the plaintiffs for continued sale or display to adults of otherwise presumptively protected motion picture films, video tapes, books, magazines and live entertainment that could be deemed harmful to minors within five hundred (500) feet of the nearest property line of a school or church, and in effect chilling the exercise of the plaintiffs' First Amendment Rights under the Constitution of the United States of America.

23. That at no time have minors had any direct or indirect visual or auditory access to the sale or display of the motion picture films, video tapes, books, magazines and live entertainment contained in the premises of the plaintiff, Studio Art, nor are any of said materials or performances visible from the exterior of Studio Art's premises.

24. That the defendants, their agents, servants and employees, have established a policy, custom, practice and pattern to enforce the provisions of I.C. 35-49-3-3 and, in particular, subsection (3) which prohibits the sale or display for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church, notwithstanding the fact that no allegations of a sale or display to minors has at anytime been made nor has there been any allegation that a minor has been allowed inside the premises, or that any of the matter deemed harmful to minors, as defined by I.C. 35-49-2-2, been available to any minor whatsoever.

25. That the prosecution and threatened prosecutions against the plaintiffs proceeded and/or threatened to proceed solely on the basis that matter allegedly obscene to minors, but which is unavailable to them, may serve as predicate offenses against these plaintiffs even though the material is available only to consenting adults. That the plaintiffs have a constitutional right to

conduct their business with consenting adults free of inference by the defendants, whose sole basis for prosecution against plaintiffs is that it is furnishing material to consenting adults which may be harmful in the possession of a minor.

26. That the use of I.C. 35-49-3-3, and in particular, the statutory definition of "obscenity to minors" as found in I.C. 35-49-2-2, as a predicate act for an alleged violation of I.C. 35-45-6-2 constitutes an unconstitutional prior restraint in deprivation of the plaintiffs' rights, as written and/or as applied to the conduct of the plaintiffs in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Furthermore, the aforementioned statutes, as written and/or as applied to the conduct of the plaintiffs herein are unconstitutionally overbroad and deny plaintiffs equal protection under the law.

27. In particular, I.C. 35-49-3-3, by its direct application and its use as a predicate under the State RICO statute effectuates a circumstance whereby the sale and dissemination of otherwise nonobscene books, magazines, video tapes, motion picture films and live performances to adults is totally restricted and prohibited, all based upon a standard of obscenity as to minors, all of which is a violation of plaintiffs' First, Fourth, Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution.

28. That the defendants, and each of them, have under color of state law selectively enforced the aforesaid state statutes against these plaintiffs on the sole and exclusive basis that these plaintiffs' retail business establishment deals primarily with sexually explicit material, a basis which is violative of these plaintiffs' rights of equal protection under the United States Constitution.

29. That by reason of the actual and threatened conduct of the defendants in both effectuating and pur-

suing the enforcement of I.C. 35-49-3-3 as a valid penal statute, independently or as a predicate under I.C. 35-45-6-2, all by virtue of the sale, display and/or presentation of presumptively protected motion picture films, video tapes, books, magazines and live entertainment, plaintiffs' rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States will and/or have been violated to their irreparable harm for which the plaintiffs have no adequate remedy at law. Immediate and irreparable injury and incalculable constitutional loss and damage to the plaintiffs, and a chilling effect on the exercise of both plaintiffs and members of the adult public's constitutional rights will result if an injunction is not issued forbidding the defendants, their agents, servants and employees, from continuing in the hereinabove described conduct.

30. That plaintiff, Studio Art, has been convicted of a felony, as aforesaid, pursuant to I.C. 35-45-6-2, using I.C. 35-49-3-3(3), which statutes are unconstitutional both on their face and in their application to this plaintiff, which resulted in a conviction of Studio Art in violation of its rights under the United States Constitution.

WHEREFORE, plaintiffs pray judgment of and from the defendants, and each of them, as follows:

1. That a permanent injunction, after trial, issue from this Court restraining the defendants, their agents, servants and employees, from further arrests or prosecutions, or threats of arrests or prosecutions for alleged violations of I.C. 35-45-6-2, utilizing as a predicate act an alleged violation of I.C. 35-49-3-3 in the factual context at bar.

2. That this Court issue a declaratory judgment declaring I.C. 35-49-3-3 to be unconstitutional on its face or, in the alternative, that this Court declare the application and threatened application of the aforementioned statute to the plaintiffs' conduct described herein to be unconstitutional.

3. That the prior conviction of plaintiff, Studio Art, for violating I.C. 35-45-6-2, predicated upon violations of I.C. 35-49-3-3(3), be declared unconstitutional and held for naught, and the fines and costs assessed declared void.

4. That the plaintiffs have such other relief as may be appropriate under the circumstances in this case.

Respectfully submitted,

LEE J. KLEIN (P-25186) (Mich.)*
KLEIN AND SHAFER, P.C.
4121 Okemos Road, Suite 20
Okemos, MI 48864

LOCKYEAR & KORNBLUM
555 Sycamore Street
P.O. Box 3515
Evansville, Indiana 47734-3515

By: /s/ [*Illegible*]

ATTORNEYS FOR PLAINTIFFS

VERIFICATION

The undersigned affirms under the penalties for perjury that the above and foregoing representations are true and correct as I am informed and do verily believe.

/s/ William Montrose

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* Motion to Appear Pro Hac Vice pending.

APPENDIX O

ANSWER OF DEFENDANTS ROBERT J. PIGMAN AND LINLEY E. PEARSON

(United States District Court —
Southern District Of Indiana —
Evansville Division)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, v. CITY OF EVANSVILLE, INDIANA; RAY HAMNER, as Chief of Police of the Evansville Police Department; ROBERT J. PIGMAN, as Prosecutor of the County of Vanderburgh, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana, Defendants — Cause No. EV 90-192-C)

Come now Defendants Robert J. Pigman, and Linley E. Pearson by William E. Daily, Deputy Attorney General, and answer the Plaintiffs' Complaint for Permanent Injunction and Declaratory Relief as follows:

1. Defendants deny paragraphs 3, 6, 12, 13, 22, 25, 26, 27, 28, 29 and 30 of the Complaint.

2. Defendants are without sufficient information to form a belief as to the truth or accuracy of paragraphs 4, 5, 18, 19, 23 and 24 of the Complaint.

3. Defendants assert that Ind. Code § 35-45-6-2 *et seq.* and Ind. Code § 35-49-3-3 are facially constitutional and have not and will not be applied to the Plaintiffs by the Defendants in any unconstitutional manner.

Wherefore Defendants respectfully request that a Judgment be entered upholding the constitutionality of Ind. Code §§ 35-45-6-2 and 35-49-3-3, denying the relief

sought by the Plaintiffs and granting Defendants such other relief as may be appropriate in this case.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ William E. Daily
Deputy Attorney General

Attorneys for Defendants

APPENDIX P

PARTIES' JOINT STIPULATION OF FACTS

(United States District Court —
Southern District of Indiana —
Evansville Division)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, v. CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY M. LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

NOW COME Plaintiffs Studio Art Theatre of Evansville, Inc. and William Montrose, by counsel, James Kornblum and Bradley J. Shafer; Defendants the City of Evansville, Indiana and Art Gann, Chief of Police of the Evansville Police Department, by counsel, David Bunner, Attorney at Law; and Defendants Stanley M. Levco, Prosecuting Attorney of the County of Vanderburgh, Indiana and Pamela Carter, Attorney General of the State of Indiana, by counsel, Seth M. Lahn, Deputy Attorney General, and hereby stipulate, solely for purposes of this action, to the following facts for admission into evidence at, or in lieu of, trial of this cause (to which the parties now stipulate without prejudice to any party's rights to submit evidence of, or proposed findings of, additional facts at a subsequent point in this action if necessary for the resolution of this matter):

1. Studio Art Theatre of Evansville, Inc. ("Studio Art") is an Indiana corporation lawfully incorporated on September 18, 1978, pursuant to the Indiana General Corporation Act. Studio Art has been incorporated to transact any and all lawful business for which a corporation may

be incorporated under the Indiana General Corporation Act since the date of September 18, 1978. Studio Art has as its resident agent CT Corporation System, located at 101 Merchants Bank Building, Indianapolis, Indiana 46204.

2. The President of Studio Art is William Montrose ("Montrose"), who is a resident of Evansville, Indiana.

3. Studio Art is the present owner and operator of a retail adult entertainment business located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, which has continually engaged in the business of retail sales of sexually explicit and other expressive and non-expressive matter at that location since 1978.

4. Studio Art is primarily engaged in the sale of videotapes, books and magazines and in the exhibition of live entertainment and motion picture films in its bookstore, theatre and entertainment complex, located at 213 [*sic*] West Franklin Street, Evansville, Vanderburgh County, Indiana, and Studio Art has offered, now offers, and wishes to continue to offer such matter to the interested adult public.

5. The business premises of Studio Art at 2113 West Franklin Street, Evansville, Vanderburgh County, Indiana, is located in a fully enclosed building, and there is no ability to see or view from the outside of the premises any of the inventory and/or merchandise offered for sale or rental in the store, nor is there any ability to either hear or view from the exterior of the premises any of the films showing or live conduct occurring therein. In addition, exterior signs instruct patrons that access to the store premises is restricted to those 18 years of age and older.

6. Defendant Art Gann ("Gann") is a party to this action in his official capacity as the Chief of Police of

the Evansville Police Department.* He has the authority conferred on him by statute to enforce the statutes of the State of Indiana and the ordinances of the City of Evansville, Indiana.

7. Defendant Stanley M. Levco ("Levco") is a party to this action in his official capacity as the Prosecutor of Vanderburgh County and has the prosecutorial authority given to him by the statutes of the State of Indiana including, but not limited to, the authority to file informations initiating criminal proceedings within the County of Vanderburgh, Indiana.

8. Defendant Pamela Carter is a party to this action in her official capacity as Attorney General of the State of Indiana and has the authority conferred on her by the statutes of the State of Indiana including, but not limited to, the duty to defend where appropriate the constitutionality of the statutes of the State of Indiana.

9. Defendants City of Evansville, Gann, and Levco, and their agents, servants, employees, deputies, officers, and other persons acting under their direction and control, have prosecuted Studio Art and its employees and Montrose for violations of Ind. Code § 35-45-6-2, the "RICO" statute, using the predicate acts under the violation of Ind. Code § 3B-49-3-3. On April 29, 1985, an Indictment (Cause No. 5436) was filed in the Vanderburgh Circuit Court against Studio Art, Montrose, and other parties alleging various acts in violation of Ind. Code § 35-45-6-2(a)(3). On June 4, 1987, an Amended Indictment in Cause No. 5436 was filed charging Studio Art, Montrose and other parties with a violation of Ind. Code

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***As the individual Defendants all were sued solely in their official capacities, the names of the current holders of such Defendants' public offices have, in accordance with Fed. R. Civ. P. 25(d)(1), been substituted herein for the names of the officeholders originally named in the Complaint. Any reference in this Stipulation to any of the individual Defendants shall be understood and deemed to refer as well to previous holders of such Defendant's respective office.**

§ 35-45-6-2(a)(3). On October 19, 1987, the Vanderburgh Circuit Court granted the State's motion to dismiss the Amended Indictment against Montrose and other parties, and Studio Art became the sole remaining defendant in the proceeding. The State of Indiana, by the prosecuting Attorney of Vanderburgh County, and Studio Art signed and filed a Stipulation of Facts in Cause No. 5436, which is hereby incorporated by reference for purposes of the present action except to the extent that such facts are specifically alleged herein.

10. The Vanderburgh Circuit Court subsequently entered Findings of Fact in Cause No. 5436, finding that Studio Art was guilty of four (4) counts of Inc. [*sic*] Code § 35-49-3-3(3) and that Studio Art was guilty of corrupt business influence, a violation of Ind. Code § 35-45-6-2(a)(3).

11. St. Boniface Catholic School is a school for seventh and eighth grade school children, which operates its school year from the Tuesday following Labor Day through the end of the first week of June of each school year and is located at 2301 West Michigan Street, Evansville, Vanderburgh County, Indiana. St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith and is located at 418 North Wabash Avenue, Evansville, Vanderburgh County, Indiana. Simpson United Methodist Church is a church used for religious services by members of the Methodist faith and is located at 2201 West Illinois Street, Evansville, Vanderburgh County, Indiana.

12. The business premises of Studio Art is located within five hundred (500) feet, as measured by straight line distance, of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and the Simpson United Methodist Church, and was so located at all times relevant to these proceedings.

13. Because of the proximate location of Studio Art to St. Boniface Catholic Church, St. Boniface Catholic

School and Simpson United Methodist Church, William Montrose and Studio Art and its officers, employees, and independent contractors have in the past been prosecuted by Gann and Levco, as specifically set forth in paragraphs 9 and 10, *supra*, for violating Ind. Code § 35-49-3-3(3) for selling or displaying for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church, and for violation of the state "RICO" statute, Ind. Code § 35-45-6-2, using as the predicate acts for that charge the alleged violations of Ind. Code § 35-49-3-3(3).

14. Gann and Levco have indicated that they will continue to prosecute Montrose and Studio Art, its officers, agents, and employees for violations of Ind. Code § 35-45-6-2 and the predicate offense of Ind. Code § 35-49-3-3(3) in the future should any matter deemed "harmful to minors" be displayed on the premises or be sold to any person on the premises of Studio Art.

15. Studio Art sells and rents material and provides entertainment performances to the adult public that are harmful to minors in that they describe or represent nudity, sexual conduct and sexual excitement; considered as a whole, appeal to the prurient interest in sex of minors; are patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and considered as a whole, lack serious literary, artistic, political, or scientific value for minors. Studio Art has engaged in these activities and continues to engage in these activities knowingly and intentionally in the ordinary course of its business.

16. Defendants have not alleged or charged to date that either Studio Art or Montrose has violated any subsection of Ind. Code § 35-49-3-3 other than Ind. Code § 35-49-3-3(3).

17. Defendant the City of Evansville, Indiana, by and through the Evansville Police Department and its offi-

cers, deputies, and other persons, at the direction of or in cooperation with Defendant Levco, has indicated that it may prosecute Montrose, Studio Art and its employees and independent contractors for continued sale or display of adult motion picture films, videotapes, books, magazines and live entertainment that could be deemed harmful to minors within five hundred (500) feet of the nearest property line of the school or church.

18. All the activities stipulated to by Studio Art in the way of the presentation, the display, sale and rental of videotapes, books, magazines, together with the exhibition of live entertainment and motion picture films, were done inside the business premises of Studio Art at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

19. Defendants have not alleged or charged to date that minors under the age of eighteen (18) were ever upon the business premises of Studio Art; had access to, or otherwise could view the display of, any material, books, magazines, films, or any performances on the business premises of Studio Art from the exterior thereof; or that the sale and presentation of such material, books, magazines, and films and the presentation of any such performance has occurred except inside said premises and to and before adult customers.

LOCKYEAR & KORNBLUM
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BRADLEY J. SHAFER
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Attorney at Law
P.O. Box 1426
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By: /s/ [*Illegible*]

ATTORNEYS FOR PLAINTIFFS

PAMELA CARTER
Attorney General of Indiana
Office of Attorney General
219 State House
Indianapolis, IN 46204-2794

By: /s/ Seth M. Lahn
Deputy Attorney General

ATTORNEY FOR DEFENDANTS PAMELA CARTER
AND STANLEY M. LEVCO

/s/ DAVID BUNNER
Attorney at Law
518 Court Building
123 Northwest Fourth St.
Evansville, IN 47708

ATTORNEY FOR CITY OF EVANSVILLE
AND ART GANN

APPENDIX Q

STIPULATION OF FACTS

(State of Indiana — Vanderburgh County Circuit Court)

(Filed October 19, 1987)

(STATE OF INDIANA vs. WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. D/B/A WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.M.W. INVESTMENTS, INC. AND WILLIAM MONTROSE — CAUSE NO. 5436)

Comes now the State of Indiana, by Prosecuting Attorney, Robert J. Pigman, and comes now the Studio Art Theatre of Evansville Inc. by their attorneys, Lee Klein and Theodore Lockyear, and hereby stipulate to the following set of facts for admission into evidence at the trial of this cause:

1. That the Studio Art Theatre of Evansville Inc. is an Indiana Corporation lawfully incorporated on September 18, 1978 pursuant to the Indiana General Corporation Act. That the Studio Art Theatre of Evansville Inc. has been incorporated to transact any and all lawful business for which corporations may be incorporated under the Indiana General Corporation Act since the date of September 18, 1978. That the Studio Art Theatre of Evansville Inc. has as its resident agent CT Corporation System, located at 101 Merchants Bank Building, Indianapolis, Indiana, 46204. That the President of the Studio Art Theatre of Evansville Inc. is William Montrose.

2. That the Studio Art Theatre of Evansville Inc. is the owner and operator of a retail adult entertainment business, located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana. That the Studio Art Theatre of Evansville Inc. was the owner and operator of said business on the 17th day of

December, 1985, the 19th day of December, 1985, and the 6th day of February, 1986 and was between the periods of November 11, 1985 and February 11, 1986 engaged in the retail sales of sexually explicit and other materials.

3. That the Studio Art Theatre of Evansville Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana, the video cassette film entitled *"Teenage Runaway"*. That this film was knowingly possessed and knowingly displayed for sale during the ordinary course of business of the Studio Art Theatre of Evansville Inc. as it was conducting its business activities on December 17, 1985.

4. That the Studio Art Theatre of Evansville Inc. did knowingly have in its possession and did knowingly display for sale to its retail adult customers at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana the video cassette film entitled *"Seduction of Lana Shore"*. That said video cassette film entitled *"Seduction of Lana Shore"* was displayed for sale during the ordinary course of business of the Studio Art Theatre of Evansville Inc. as it was conducting its business activities on December 19, 1985.

5. That the films *"Seduction of Lana Shore"* and *"Teenage Runaway"* contain sexual conduct depictions of nudity, sexual conduct and sexual excitement. That considered as a whole the film *"Teenage Runaway"* and *"Seduction of Lana Shore"* appeal to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and that considered as a whole, it lacks serious literary, artistic, political or scientifical [*sic*] value for minors.

6. That the Studio Art Theatre of Evansville Inc. did knowingly sell to Gerald Wingerter, an adult customer and an Evansville City Police Officer, a film entitled *"Boys in the Bath"* at its business premises, at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on February 6, 1986. That the sale of said film *"Boys in the Bath"* was in the ordinary course of business of the Studio Art Theatre of Evansville Inc.

7. That the film *"Boys in the Bath"* contains sexual depictions of nudity, sexual conduct and sexual excitement. That considered as a whole, the film *"Boys in the Bath"* appeals to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors and that considered as a whole it lacks serious literary, artistic, political or scientific value for minors.

8. That the Studio Art Theatre of Evansville Inc. did knowingly sell to Gerald Wingerter, an adult customer and a member of the Evansville Police Department, the film entitled *"Geisha's Slave"* during the ordinary course of business at its business premises 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on February 6, 1986. That said film *"Geisha's Slave"* contains depictions of sexual conduct, nudity, and sexual excitement. That taken as a whole it appeals to the prurient interest in sex of minors, that it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors and that considered as a whole the film *"Geisha's Slave"* lacks serious literary, artistic, political or scientific value for minors.

9. That the business premises of Studio Art Theatre of Evansville Inc. where the films *"Teenage Runaway"* and *"Seduction of Lana Shore"* were displayed and where the sale of the films *"Boys in the Bath"* and

"Geisha's Slave" was made is located within five hundred feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church as that distance has been calculated using the method of calculation based upon the order of the Vanderburgh Circuit Court, the Honorable Judge William H. Miller, dated June 8, 1987. That based on that calculation the entire business premises of the Studio Art Theatre of Evansville Inc. is within five hundred feet of the closest property line of the aforesaid St. Boniface Catholic Church and St. Boniface Catholic School and was so located at all times relevant to these proceedings. That the point within the business premise of said Studio Art Theatre of Evansville Inc. where the aforesaid films were displayed for sale and sold as aforesaid is within five hundred feet of the Simpson United Methodist Church as that distance has been calculated using the method of calculation based on the order of Vanderburgh Circuit Court, the Honorable Judge William H. Miller, dated June 8, 1987.

10. That at the time and on the date of the display of the video cassette films entitled *"Teenage Runaway"* and *"The Seduction of Lana Shore"* and the sale of the video cassette films entitled *"Boys in the Bath"* and *"Geisha's Slave"*, the business premises of the Studio Art Theatre of Evansville Inc., where such transactions took place, was more than five hundred (500) feet from the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church measured from the front public entrance of the business premises to said school and churches using the calculations and measurements of distance of Sam Biggerstaff, a surveyor. That said measurements from Studio Art's front public entrance East along Franklin Street to 10th Avenue; thence North on 10th Avenue to the nearest property line of St. Boniface Catholic Church and St. Boniface Catholic School is 527 feet. That said measurements from Studio Art's front public

entrance West along Franklin Street to 11th Avenue; thence South on 11th Avenue to the nearest line of Simpson United Methodist Church is 615 feet.

11. That defendant's Exhibit 1 is to a scale plat drawing of the area surrounding the business premises of the Studio Art Theatre of Evansville Inc., including the locations of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church. That said exhibit and the distances portrayed thereon from the business premises to points B and C are accurate and all relative locations, structures and property lines are to the scale set out therein. That the distance and relative locations of each item set out on said plat are present in the positions located thereon at all times relevant to these proceedings.

12. That defendant's Exhibit 1 is admissible into evidence without objection.

13. That the video cassette films entitled *"Teenage Runaway"*, marked State's exhibit 1 and *"Seduction of Lana Shore"* marked State's exhibit 2, are the actual video cassette films which were displayed for sale by Studio Art Theatre of Evansville Inc. at its business premises at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana on December 17, 1985 and December 19, 1985. That the video cassette films entitled *"Boys in the Bath"* and *"Geisha's Slave"* marked State's exhibits 3 and 4 respectively are the actual video cassette films sold on February 6, 1986 to Gerald Wingerter at the business premises of the Studio Art Theatre of Evansville Inc. located at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana.

14. That State's exhibit 5 is an accurate copy of the quarter sheets which are the official records of the City Engineers Office for the City of Evansville. That the pink area of said map is an accurate depiction of the location of the business premises of the Studio Art Theatre

of Evansville Inc. That the smaller green area of said map marked Simpson U.M.C. accurately depicts the location of Simpson United Methodist Church and that the larger green area of said map marked St. Boniface Church accurately depicts the location of the St. Boniface Catholic Church and St. Boniface Catholic School with St. Boniface Catholic School occupying the western portion of said area and St. Boniface Catholic Church representing the eastern portion of said area. That said map is accurate in all of its relative locations, structures and property lines to the scale set out thereon. That the distances and relative locations of each item set out on said map were present in the positions indicated thereon for all times relevant to these proceedings.

15. That State's exhibit 1-5 are admissible into evidence without objection.

16. That St. Boniface Catholic School is a school for seventh and eighth grade school children which operates its school year from the Tuesday following Labor Day through the end of the first week of June for each school year. That St. Boniface Catholic Church is a church used for religious services by members of the Catholic faith. That Simpson United Methodist Church is a church used for religious services by members of the Methodist faith.

17. That the Studio Art Theatre of Evansville Inc. participated in all the aforesaid conduct involving the display of the films, *"Teenage Runaway"* and *"Seduction of Lana Shore"* and the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* knowingly and intentionally and during the ordinary course of its business on the dates herein stipulated.

18. All of the activities stipulated to by the Studio Art Theatre of Evansville Inc. involving display for sale of the films *"Teenage Runaway"* and *"Seduction of Lana Shore"* and the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* were done inside the business premises

of the Studio Art Theatre of Evansville Inc. at 2113 West Franklin Street, in the City of Evansville, County of Vanderburgh, State of Indiana,

19. There is no allegation, issue or evidence presented in this case by the Amended Indictment that minors under the age of eighteen (18) were ever upon, had access to or otherwise could view the display of any material, books, magazines or films on the Business Premises of Studio Art from the exterior thereof, including but not limited to, the display of the video cassette films entitled *"Teenage Runaway"* and *"Seduction of Lana Shore"*. That the sale of the films *"Boys in the Bath"* and *"Geisha's Slave"* on February 6, 1986, to Gerald Wingerter were sales to an adult customer of the Studio Art inside the business premises of the said Studio Art.

Respectfully submitted,

/s/ Robert J. Pigman
Prosecuting Attorney

/s/ Theodore Lockyear
Attorney for the Studio Art Theatre
of Evansville Inc.

/s/ Lee Klein
Attorney for Studio Art Theatre
of Evansville Inc.

[handwritten] /s/ *William J. Montrose*
President
Studio Art Theatre
of Evansville Inc.

APPENDIX R

AGREEMENT

(State of Indiana — Vanderburgh County Circuit Court)

(Dated October, 1987)

(STATE OF INDIANA -vs- WORLD WIDE BUSINESS MANAGEMENT AND CONSULTANTS, INC. d/b/a WORLD WIDE BUSINESS MANAGEMENT INC., STUDIO ART THEATRE OF EVANSVILLE, INC., A.M.W. INVESTMENTS, INC., and WILLIAM MONTROSE — CAUSE NO. 5436)

The parties to the above-identified litigation and other parties as hereinafter in this Agreement identified, do hereby stipulate and agree to the following terms and conditions:

WHEREAS, the State of Indiana by and through the Vanderburgh County Prosecutor's Office (hereinafter "PROSECUTOR") and through a Vanderburgh County Grand Jury did issue and file a formal one count Indictment (hereinafter "INDICTMENT") on or about April 29, 1986, charging a violation of the Indiana Corrupt Business Influenced [*sic*] Act, I.C. 35-45-6-2(a)(3); and,

WHEREAS, said INDICTMENT based upon 29 predicate acts listed therein, all relating to the Indiana Obscenity Statute, I.C. 35-49-3, *et seq.*, did identify and name as defendants, Studio Art Theatre Corp. (hereinafter "STUDIO ART"), William A. Montrose (hereinafter "MONTROSE"), World Wide Business Management and Consulting, Inc. (hereinafter "WORLD WIDE"), and A.M.W. Investments, Inc. (hereinafter "A.M.W."); and,

WHEREAS, the INDICTMENT was amended by the filing of an Amended Indictment (hereinafter "AMENDED INDICTMENT") on or about June 4, 1987, based upon predicate acts, all of which were contained in the original INDICTMENT, alleging violations of the Indiana

Obscenity Statute and, in particular, I.C. 35-49-3-2, I.C. 35-49-3-3(3) and I.C. 35-49-3-1(2); and,

WHEREAS, issues have been raised as to whether or not WORLD WIDE and A.M.W. have been formally served with process in this matter and are subject to jurisdiction in Indiana, and in particular, the Vanderburgh Circuit Court; and;

WHEREAS, MONTROSE has been formally served and has appeared in this matter and is represented by the law offices of Lee J. Klein, P.C. by Lee J. Klein; and,

WHEREAS, STUDIO ART has been formally served and has appeared in this matter and is represented by the law firm of Lockyear & Kornblum by Theodore Lockyear; and,

WHEREAS, there is currently scheduled and set a trial by jury in the Vanderburgh Circuit Court to commence Monday, October 19, 1987, on the AMENDED INDICTMENT; and,

WHEREAS, the parties hereto are desirous of stipulating to certain facts and evidence pursuant to and in furtherance of the terms and conditions as contained hereinafter in this Agreement.

NOW, THEREFORE, IN FURTHERANCE OF THE PREMISES HEREIN and the agreements and understandings between the parties, each party hereto acknowledging its intent and desire to be bound by the contents of this Agreement, do hereby agree as follows:

1.

DISMISSAL OF MONTROSE

PROSECUTOR agrees not to prosecute and to dismiss without prejudice the pending charges in the AMENDED INDICTMENT against MONTROSE. PROSECUTOR shall have the right, however, to refile the AMENDED INDICTMENT against MONTROSE in the event of a material breach by

STUDIO ART and/or A.M.W. of the terms as set forth in this Agreement.

2.

DISMISSAL OF WORLD WIDE

PROSECUTOR agrees not to prosecute and to dismiss without prejudice the INDICTMENT filed against defendant, WORLD WIDE. The PROSECUTOR shall have the right, however, to refile the AMENDED INDICTMENT against WORLD WIDE in the event of a material breach by STUDIO ART and/or A.M.W. of the terms as set forth in this Agreement.

3.

JURISDICTION OVER A.M.W.

A.M.W., for the limited purposes of acknowledging jurisdiction of the Vanderburgh Circuit Court in connection with the AMENDED INDICTMENT, does hereby acknowledge service of process upon it of the AMENDED INDICTMENT, and does hereby submit to the jurisdiction of the Vanderburgh Circuit Court.

4.

DISMISSAL OF A.M.W.

PROSECUTOR agrees not to prosecute and to dismiss without prejudice the AMENDED INDICTMENT against A.M.W. PROSECUTOR shall have the right, however, to refile the AMENDED INDICTMENT against A.M.W. in the event of a material breach by STUDIO ART and/or A.M.W. of the terms as set forth in this Agreement.

5.

DISMISSAL OF PREDICATE ACTS

PROSECUTOR agrees to dismiss against STUDIO ART all of the predicate acts identified and listed in the AMENDED INDICTMENT except for predicate act #12 (concerning the film "Teenage Runaway"), predicate act #13 (concerning the film "Seduction of Lana Shore"), predi-

cate act #14 (concerning the film "Boys in a Bath"), and predicate act #15 (concerning the film "Geisha Slave"); each of the remaining predicate acts #12 through #15 inclusive, charging violations of I.C. 35-49-3-3(3) only as a predicate to I.C. 35-45-6-2(a)(3).

6.

STIPULATED EVIDENTIARY FACTS AND EVIDENCE

STUDIO ART, being the only defendant not being dismissed from the AMENDED INDICTMENT, and the PROSECUTOR do hereby stipulate and agree the following facts and evidence shall be presented to the Vanderburgh Circuit Court (by separate stipulation) and offered to be admitted in connection with the trial on the AMENDED INDICTMENT currently scheduled to commence on October 19, 1987:

A. That STUDIO ART is the owner and operator of that certain retail adult entertainment business (hereinafter "Business Premises") located at 2113 West Franklin Street, Evansville, Indiana.

B. That STUDIO ART was the owner and operator of the aforesaid Business Premises on the following dates:

> December 17, 1985, December 19, 1985, and February 6, 1986.

and at all times relevant as set forth in the AMENDED INDICTMENT.

C. That STUDIO ART did have in its possession and did knowingly display for sale to its retail adult customers, at its Business Premises, the video cassette film entitled "Teenage Runaway" on December 17, 1985.

D. That STUDIO ART did have in its possession and did knowingly display for sale to its retail adult customers, at its Business Premises, the video

cassette film entitled "Seduction of Lana Shore" on December 19, 1985.

E. That STUDIO ART did knowingly sell to Gerald Wingerter, an adult customer, matter that contains sexual depictions that are deemed harmful to minors under the applicable Indiana statutes, to-wit: the movie "Boys In A Bath" on February 6, 1986.

F. That STUDIO ART did knowingly sell to Gerald Wingerter, an adult customer, matter that contains sexual depictions that are deemed harmful to minors under the applicable Indiana statutes, to-wit: the movie "Guisha's [*sic*] Slave" on February 6, 1986.

G. That the Business Premises of STUDIO ART where the display of the films "Teenage Runaway" and "Seduction of Lana Shore" and the sale of the films "Boys In A Bath" and "Guisha's Slave" (as referred to in paragraphs C, D, E and F hereinbefore) measured from the front public entrance of said Business Premises is more than 500 feet from the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School and Simpson United Methodist Church using the calculations and measurements of distance of Sam Biggerstaff, Surveyor. That said measurements from STUDIO ART's front public entrance East along Franklin Street to 10th Avenue; thence North on 10th Avenue to the nearest property line of St. Boniface Catholic Church and St. Boniface Catholic School is 527 feet. That said measurements from STUDIO ART's front public entrance West along Franklin Street to 11th Avenue; thence South on 11th Avenue to the nearest property line of Simpson United Methodist Church is 615 feet.

H. That the Business Premises of STUDIO ART where the display of the films "Teenage Runaway" and

"Seduction of Lana Shore" and the sale of the films "Boys In A Bath" and "Guisha's Slave" (as referred to in paragraphs C, D, E and F hereinbefore), took place within 500 feet of the nearest property line of St. Boniface Catholic Church, St. Boniface Catholic School, and Simpson United Methodist Church, using the method of calculation of said distance based upon the Order of Vanderburgh Circuit Court Judge William H. Miller dated June 8, 1987.

I. There is no allegation or issue presented by the AMENDED INDICTMENT and/or PROSECUTOR that minors under the age of eighteen (18) were ever upon, had access to or otherwise could view the display of any material, books, magazines or films on the Business premises of STUDIO ART from the exterior thereof, including but not limited to, the display of the video cassette films entitled "Teenage Runaway" and "Seduction of Lana Shore". That the sale of the films "Boys In A Bath" and "Guisha's Slave" on February 6, 1986, to Gerald Wingerter were sales to an adult customer of the STUDIO ART.

J. That STUDIO ART participated in the aforesaid conduct of the display of the video cassette films entitled "Teenage Runaway" and "Seduction of Lana Shore", and the sale of the video cassette films entitled "Boys In A Bath" and "Guisha's Slave", knowingly and intentionally.

K. That the video cassette films entitled "Teenage Runaway" and "Seduction of Lana Shore", currently in the possession of the PROSECUTOR, are the actual video cassette films which were displayed for sale by STUDIO ART on its Business premises on December 17, 1985, and December 19, 1985. That the video cassette films entitled "Boys In A Bath" and "Guisha's Slave", currently in the possession of the PROSECUTOR, are the actual video cas-

sette films sold on February 6, 1986. STUDIO ART stipulates to the admission into evidence of the aforesaid video cassette films without objection to the chain of custody thereof, subject to its right of verification of authenticity of said films.

L. STUDIO ART and PROSECUTOR agree to prepare and execute for submission to the Vanderburgh Circuit Court in connection with the trial on the AMENDED INDICTMENT, currently set for trial on October 19, 1987, a stipulation of the facts and evidence as hereinbefore in this Agreement set forth. (Paragraphs 6(A) through 6(K)). In the event that the Court rejects the stipulation of evidentiary facts and evidence, the parties agree that evidence consistent with and limited to the facts set forth in paragraphs 6(A) through 6(K), inclusive, may be offered by the parties at the trial of said cause.

M.* That each of the videocassette motion picture films as identified in predicate acts 11, 12, 13 and 14 of the amended indictment, that being the videocassettes of the films "Boys in The Bath", "Geisha Slave", "The Seduction of Lana Shore" and "Teenage Runaways",

(1) Describes and represents nudity, sexual conduct and sexual excitement.

(2) Considered as a whole, each film appeals to the prurient interest in sex of minors.

(3) Each film is patently offensive to prevailing standards in the adult community of Vanderburgh County, as a whole with respect to what is suitable matter for minors, and

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*[*Printer's Note*]: **Paragraph "M" is an initialled insertion included on a separate page in original document.**

(4) That considered as a whole, each film lacks serious literary, artistic, political or scientific value for minors.

7.

WAIVER OF RIGHT TO TRIAL BY JURY AND SUBMISSION ON AGREED STATEMENT OF FACTS

STUDIO ART and PROSECUTOR agree that a stipulation of the foregoing stipulated facts shall at the date and time set for trial in the instant matter be submitted to the Vanderburgh Circuit Court as the stipulated facts as agreed between the parties for purposes of allowing the Vanderburgh Circuit Court Judge, the Honorable William H. Miller, to determine the guilt or innocence of STUDIO ART as to predicate acts 12, 13, 14 and 15 as identified in the AMENDED INDICTMENT, with STUDIO ART agreeing to waive any right to trial by jury in said matter at or prior to the date set for trial of said cause.

8.

FINES AND COURT COSTS IN THE EVENT OF CONVICTION

In the event that the Vanderburgh Circuit Court shall find STUDIO ART guilty of violations of the Indiana Corrupt Business Influenced [*sic*] Act, I.C. 35-45-6-2(a)(3), as alleged in the AMENDED INDICTMENT, and to the extent that STUDIO ART may, by law or otherwise, agree and/or stipulate to the imposition and assessment of fines and/or court costs, STUDIO ART agrees not to appeal as excessive the imposition of a fine up to the total sum of $5,000.00 plus court costs. That PROSECUTOR agrees not to ask for the imposition of a fine in excess of $5,000.00. Each party to have the right to fully argue to the Court the amount of said fine, if any, to be imposed by the Court.

9.

APPEAL FROM CONVICTION

In the event that STUDIO ART is found guilty of a violation of the Indiana Corrupt Business Influenced Act, I.C.

35-45-6-2-(a)(3), PROSECUTOR and STUDIO ART acknowledge and agree that it is the intent and purpose of this Agreement that STUDIO ART have the right to appeal said conviction through any and all appellate processes and to assert any right in the Federal Courts, allowed by law to STUDIO ART, raising therein any and all constitutional arguments relating to the legality and/or constitutionality of the Indiana Corrupt Business Influenced [*sic*] Act pursuant to which STUDIO ART is charged, the use of the Indiana Obscenity Statute, I.C. 35-49-3, et seq., as predicate acts thereunder, the constitutionality of the obscenity to minors statute, I.C. 35-49-3-3, and any other defenses properly raised by STUDIO ART in these proceedings; it being the intention of STUDIO ART and PROSECUTOR that the execution and entry into this Agreement not preclude, inhibit or in any way act to prevent STUDIO ART from raising any and all defenses to any conviction that may be entered against STUDIO ART except as they may directly relate to the stipulations of facts as contained in this Agreement.

10.

CLOSURE OF BUSINESS UPON EXHAUSTIVE RIGHTS IN STATE AND FEDERAL COURTS

STUDIO ART acknowledges and agrees that it will and shall, in good faith, expeditiously process all of its claims of appeal and other rights in the State and Federal Courts, subsequent to the entry of any conviction against it on the AMENDED INDICTMENT. In the event that STUDIO ART shall fail to have its conviction pursuant to the AMENDED INDICTMENT (assuming entry of such conviction by the Vanderburgh Circuit Court), overturned or reversed after any and all appeals and exhaustion of rights in the State and Federal Court systems, to which STUDIO ART is entitled by law including, but not limited to, an appeal to the United States Supreme Court, STUDIO ART agrees that it will and shall, within 30 days after finality of any and all appeals, and exhaustion of rights, cease its business operations at

2113 West Franklin Street, Evansville, Indiana, and agree not to conduct any future or other business operations, whether retail, wholesale or otherwise, in Vanderburgh County, Indiana. STUDIO ART shall have the right to seek a stay of the payment of fine and costs, if any, which stay the PROSECUTOR agrees to not object to, pending appeal and exhaustion of all remedies in the State and Federal Courts. STUDIO ART shall have the right, however, to remove all of its personal property and assets from its Business Premises without the same being subject to forfeiture, seizure or otherwise in connection with the finality of any conviction. This Agreement to cease business shall be null and void in the event that STUDIO ART is successful in either the State or Federal Court systems in overturning its conviction pursuant to the AMENDED INDICTMENT and/or in the event that STUDIO ART is successful in the State or Federal Court system in obtaining a declaration of unconstitutionality of any part of the statutes (I.C. 35-45-6-2, I.C. 35-49-3-1, *et seq.*) upon which STUDIO ART's conviction rests. In the event STUDIO ART is successful in obtaining a declaration by either a State or Federal Court that any of the State statutes or portions thereof are unconstitutional requiring a reversal of the conviction or a determination of unconstitutionality or construction of said statute of which STUDIO ART could not have been prosecuted initially, then the PROSECUTOR will assist in seeking a dismissal of the charges against STUDIO ART, a dismissal of said prosecution, and STUDIO ART will have no obligation to cease its business.

It is expressly agreed and understood by the parties hereto that upon exhaustion by STUDIO ART of its State Court rights of appeal from the entry of any conviction hereunder, including any decision by or denial of the Petition for Writ of Certiorari from an adverse decision of the Indiana Supreme Court by the United States Supreme Court then, in such event, STUDIO ART shall cease all live entertainment no later than thirty (30)

days after receipt by the Clerk of the Vanderburgh Circuit Court of the mandate by the United States Supreme Court denying the Writ of Certiorari. STUDIO ART, however, shall have the right to otherwise continue the operation of its business pending the assertion (which STUDIO ART agrees to file and diligently pursue no later than thirty (30) days after finality of all State Court appellate rights and any appeal or Petition for Writ of Certiorari to the United States Supreme Court) of its rights in the Federal Court system. That upon the denial of the Writ of Certiorari by the United States Supreme Court upon STUDIO ART's Federal Court appeal, if the judgment be adverse to STUDIO ART then no later than thirty (30) days after receipt by the appropriate District Court of the mandate evidencing the denial of Writ of Certiorari, STUDIO ART shall in all things comply with the terms and conditions of this agreement. In the event that STUDIO ART is successful in a Federal District Court of the United States, the Prosecuting Attorney of the First Judicial Circuit Court, Vanderburgh County, State of Indiana shall have all rights to appeal said adverse judgment to a final conclusion, including the Petition for Writ of Certiorari to the United States Supreme Court. Similarly, if the decision is adverse to STUDIO ART, it too shall have all rights of appeal, including the Petition for Writ of Certiorari to the United States Supreme Court, if necessary. Regardless of the outcome at the Federal trial court level, STUDIO ART agrees not to resume its live entertainment performances until such time as the Prosecuting Attorney and/or the State of Indiana have exhausted their rights to appeal said decision, including a Petition to the United States Supreme Court for a Writ of Certiorari.

11.

COVENANT RUNNING WITH THE LAND

In the event of the entry of a conviction against STUDIO ART by the Vanderburgh Circuit Court on the AMENDED INDICTMENT as in this Agreement contem-

plated, and upon finality of said conviction and exhaustion of all Federal Court claims of unconstitutionality as in this Agreement contemplated, whereby STUDIO ART is either unsuccessful in overturning such conviction or unsuccessful in having any of the applicable State statutes, or any portions thereof, declared unconstitutional, A.M.W. does specifically agree, in consideration of PROSECUTOR's dismissal of the charges against it as heretofore in Paragrah Four (4) referenced, as the legal fee holder of the real estate and building in which STUDIO ART conducts its business (2113 West Franklin Street, Evansville, Indiana), that it will not and shall not allow, in the future from and after thirty (30) days subsequent to the exhaustion of any and all State and Federal Court claims (simultaneously with the obligation of STUDIO ART to cease and desist its business operations) the sale of any sexually explicit books, magazines, movies, video tapes, or otherwise from said Business premises. In connection therewith, and in order to assure the performance by A.M.W. of the obligation and agreement undertaken pursuant to this paragraph, A.M.W. agrees to execute such documents, in recordable form, that may be placed on record title with the Recorder of Vanderburgh County, Indiana, restricting the use of the property in the manner as aforesaid for the benefit of the people of the County of Vanderburgh and allowing for enforcement by the Vanderburgh County Prosecutor's Office and/or injunction.

12.

WAIVER OF SPEEDY TRIAL

A.M.W. and MONTROSE, in connection with their dismissals without prejudice as hereinabove referenced in paragraphs One (1) and Four (4) respectively, do hereby waive any rights to claim a lack of speedy trial in the event that a breach of this Agreement shall occur and charges pursuant to the AMENDED INDICTMENT are reinstated.

13.

DISMISSAL OF PENDING OBSCENITY PROSECUTIONS

The parties hereto acknowledge the existence of seven (7) obscenity cases brought against individual female performers in connection with their conducting live entertainment at the premises operated by STUDIO ART, that being 2113 West Franklin Street, Evansville, Indiana. In connection with the aforesaid cases, PROSECUTOR agrees to dismiss said pending matters, without prejudice conditioned upon the defendants therein agreeing that any future entertainment and/or dance performances to which said defendants shall engage at the STUDIO ART premises shall be devoid of the insertion of any foreign objects into any body cavity and further, that each of said defendants shall agree not to engage in conduct whereby it appears that the defendant is engaged in the act of masturbation. In addition to the foregoing, each defendant in connection with the dismissal without prejudice, shall agree to waive any defense of lack of speedy trial should they violate the terms of their Agreement, and the PROSECUTOR reinstitutes the charges being dismissed as in this paragraph identified.

14.

REGULATION OF LIVE ENTERTAINMENT BY STUDIO ART

STUDIO ART agrees that it will and shall, in connection with the operation of live entertainment at its Business Premises, impose those restrictions upon the female performers as contained in the preceding paragraph as a condition to the continued association and/or allowance of any female performer's entertainment activities at said premises. Failure to enforce such provisions by STUDIO ART shall be deemed a breach of this Agreement. However, PROSECUTOR recognizes that it is impossible for STUDIO ART to visibly monitor each and every performance by the live entertainers, and STUDIO ART's obligation pursuant to this paragraph shall only

be that of good faith enforcement hereof, and that so long as STUDIO ART, in good faith, attempts to enforce the conditions of this paragraph, it shall not be deemed in breach hereof.

15.
NON-ENFORCEMENT OF
OBSCENITY TO MINORS STATUTE

So long as the appeals and/or exhaustion of remedies in the State or Federal Court systems by STUDIO ART is pending and further conditioned upon STUDIO ART not allowing anyone under the age of eighteen (18) to frequent or enter STUDIO ART's Business Premises located at 2113 West Franklin Street, Evansville, Indiana, and further, so long as STUDIO ART does not allow the visibility of any of its inventory and stock in trade on display for sale which contains depictions as identified in I.C. 35-49-3-3(3) from outside the business premises, the PROSECUTOR agrees that it will not and shall not file charges pursuant to said obscenity to minors act either directly or as a predicate under Indiana Corrupt Business Influenced [*sic*] Act, I.C. 35-45-6-2(a)(3) until the constitutionality thereof has been determined pursuant to the appeal of STUDIO ART.

16.
EFFECT OF
STIPULATIONS OF FACT

The stipulation of evidence and facts as heretofore set forth in this Agreement and as otherwise placed on the record in connection with the trial on the charges contained in the AMENDED INDICTMENT are stipulations for the specific limited purpose of this trial only and are not intended nor may they be used in connection with any other matter except in connection with said trial or the enforcement by PROSECUTOR of the express intent and purposes of this Agreement.

17.
UNDERSTANDING
BY DEFENDANTS

Each of the defendants herein, that being MONTROSE, A.M.W. and STUDIO ART, do hereby acknowledge and agree that they have thoroughly read the contents hereof, that they have discussed and reviewed the same with legal counsel of their own choosing and that they enter into this Agreement of their own free will and volition, no other inducement, promises or conditions having been made or expressed, except as specifically set forth herein.

18.
FURTHER ASSURANCES

Each of the parties hereto do hereby agree that they will and shall make, do and execute or cause to be made, done or executed directly or by and through legal counsel, all such further acts or execution of documents as shall be necessary to effectuate the terms, conditions and agreements as contained in this document and the intent hereof. Each of the corporate parties to this agreement hereby acknowledge that they have proper corporate authority to execute this agreement on behalf of said corporations and that the individual persons executing said agreement on behalf of said corporations are properly empowered and authorized to do so on behalf of said corporations.

19.
BINDING ON
SUCCESSOR CORPORATIONS

This Argrement and the obligations and provisions contained herein shall be binding upon the parties hereto, including the offices of the Prosecutor of Vanderburgh County, Indiana, and as to STUDIO ART and

A.M.W., shall be binding upon any successor or parent corporations or other successor entities.

Dated this __ day of October, 1987.

VANDERBURGH COUNTY
PROSECUTOR'S OFFICE
By: /s/ Robert J. Pigman
Prosecuting Attorney

WILLIAM MONTROSE, Individually
By: /s/ William Montrose

LEE J. KLEIN, P.C.
By: /s/ Lee J. Klein,
Attorney for Defendant,
William Montrose

STUDIO ART THEATRE OF EVANSVILLE, INC.
By: /s/ William Montrose,
President

LOCKYEAR & KORNBLUM
By: /s/ Theodore Lockyear,
Attorney for Defendant,
Studio Art Theatre
of Evansville, Inc.

A.M.W. INVESTMENTS, INC.
By: /s/ Janet Fournier,
President

LEE J. KLEIN, P.C.
By: /s/ Randy J. Kolar,
Attorney for Defendant,
A.M.W. Investments, Inc.

APPENDIX S

PETITION FOR REHEARING

(State of Indiana — Court of Appeals)

(STUDIO ART THEATRE OF EVANSVILLE, INC., Defendant-Appellant, -vs- STATE OF INDIANA, Plaintiff-Appellee — NO. 82A01-8805-CR-152; Appeal from the Vanderburgh Circuit Court, Cause No. Below 5436, The Honorable William H. Miller, Judge)

COMES NOW the Defendant-Appellant, Studio Art Theatre of Evansville, Inc., by counsel, Lee J. Klein and James A. Kornblum of the law firm of Lockyear & Kornblum, and petitions the Court for rehearing pursuant to the provisions of Appellate Rule 11(A) of the Indiana Rules of Appellate Procedure, and in support thereof would show unto the Court as follows:

1. That the Court of Appeals of Indiana rendered an opinion in the within captioned cause on November 22, 1988.

2. That the opinion rendered by the Court of Appeals of Indiana was against the Defendant-Appellant.

3. That this Petition for Rehearing is timely filed within the period set forth in Appellate Rule 11 of the Indiana Rules of Appellate Procedure.

4. That the opinion rendered by the Court of Appeals of Indiana is erroneous in each of the following:

(a) In holding that the Indiana RICO Statute, I.C. 35-45-6-2, utilizing as predicate acts alleged violations of the Indiana Obscenity Statute, I.C. 35-49-3-3, is constitutional on its face and as applied in this case in each of the following particulars:

(1) That I.C. 35-49-3-3 is impermissibly overbroad in its regulation of material deemed

harmful to minors in that it prohibits access by adults of materials based upon a standard of what is suitable for minors in violation of the pronouncements of the United States Supreme Court in *Butler* v. *Michigan*, (1957) 352 U.S. 380, 1 L.Ed.2d 412, 75 S.Ct. 524 and *Bolger* v. *Youngs Drug Products Corp.*, (1983) 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct. 2875.

(2) That I.C. 35-49-3-3 is in violation of the Establishment Clause of the First Amendment to the Constitution of the United States in that said statute impermissibly grants a preference to churches and is, therefore, unconstitutional under the United States Supreme Court pronouncements in *Lemon* v. *Kurtzman*, (1971) 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 and *Larkin* v. *Grendel's Den*, (1982) 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505.

(3) That I.C. 35-49-3-3 is unconstitutionally vague in that said statute fails to apprise persons of common intelligence of the conduct sought to be prohibited in that reasonable persons are not put on notice by the terms of the statute as to what conduct is prohibited. For example, the statute fails to define from what point the applicable distance is to be measured; fails to define what is to be determined to be a school or church.

(4) That I.C. 35-49-3-3 on its face and as applied in this case is in violation of the Fourteenth Amendment to the Constitution of the United States in that it denies the Appellant herein equal protection of the law by utilizing the Obscenity Statute as a predicate act in that said statute sets forth a classifi-

cation of particular businesses; *i.e.*, those dealing in protected First Amendment materials to the exclusion of all other businesses.

(5) That I.C. 35-49-3-3 is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States as it operates as an unlawful taking without just compensation in that said statute fails to include a "grandfather" provision. The principal effect of such failure is to prohibit the defendant's business from continuing its operation when such business was otherwise lawfully conducted prior to the enactment of the statute.

(6) That I.C. 35-45-6-2, the RICO Statute, utilizing I.C. 35-49-3-3, the Indiana Obscenity Statute, as predicate acts has an impermissible chilling effect upon the exercise of protected First Amendment rights.

(7) That I.C. 35-45-6-2 and I.C. 35-49-3-3 are unconstitutional in that they lack a scienter requirement, an essential element of an obscenity related prosecution.

(b) The opinion rendered by the Court of Appeals of Indiana fails to give a statement in writing as to each constitutional question raised on the record and argued by the parties, which said constitutional issues are substantial and are set forth in 4(a)(1-6) above. The issue of overbreath was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a)(e) and (f) (Record p. 1-30) and briefed by Defendant-Appellant in Appellant's Brief at page 29. The Establishment Clause issue was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (f) and briefed by

Defendant-Appellant in Appellant's Brief at page 34. The issue of vagueness was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (f) and brief by Defendant-Appellant in Appellant's Brief at page 36. The issue of equal protection under the Fourteenth Amendment was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (g) and brief by Defendant-Appellant in Appellant's Brief at page 42. The issue of an unlawful taking without just compensation was preserved in the Record in the Motion to Correct Errors in rhetorical paragraphs 3(a) and 4 and briefed by Defendant-Appellant in Appellant's Brief at page 46. The issue of an impermissible chilling effect upon protected First Amendment rights was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(a) and (d) and briefed by Defendant-Appellant in Appellant's Brief at page 49. The issue pertaining to the lack of a scienter requirement was preserved in the Record in the Motion to Correct Errors in rhetorical paragraph 3(c) and briefed by Defendant-Appellant in Appellant's Brief at page 50. That the failure of the Court of Appeals' decision to render a statement in writing of each of the questions presented above has prejudicially resulted in the affirmance of this appeal.

(c) That the opinion rendered by the Court of Appeals of Indiana contravenes a ruling precedent of the United States Supreme Court in *Butler* v. *Michigan*, (1957) 352 U.S. 380, 1 L.Ed.2d 412, 75 S.Ct. 524 and *Bolger* v. *Youngs Drug Products Corp.*, 1983) 463 U.S. 60, 77 L.Ed.2d 469, 103 S.Ct. 2875, in that I.C. 35-49-3-3, as analyzed under the principles announced in said decisions, is impermissibly overbroad in that it

denies adults access to materials based upon a standard applicable only to minors.

(d) In holding that the Defendant-Appellant may be tried on an Amended Indictment which was never submitted to a grand jury or which complied with the provisions of I.C. 35-34-1-2(b)(1) providing that the Indictment shall be signed by the foreman or five (5) members of the grand jury and failed to comply with I.C. 35-34-2-12(b) which provides, in part, the Indictment must be endorsed with the phrase "a true bill".

(e) That the opinion rendered by the Court of Appeals of Indiana contravenes a ruling precedent of the Indiana Supreme Court as set forth in *Walker* v. *State*, (1968) 251 Ind. App. 432, 241 N.E.2d 792, in that the Court lacked jurisdiction to proceed upon an Amended Indictment not endorsed with the phrase "a true bill" and signed by the foreman of the grand jury or five (5) members of the grand jury.

(f) That the opinion of the Court of Appeals of Indiana purports to follow the ruling precedent of the Indiana Supreme Court in *4447 Corporation* v. *Goldsmith*, (1987) Ind. 504 N.E.2d 559 (Petition for Certiorari currently pending in the United States Supreme Court), but that such ruling in *4447 Corporation* is erroneous and/or in need of clarification or modification in that the issues presented in the instant appeal are separate and distinct issues from that present and ruled on in *4447 Corporation*. *4447 Corporation* principally dealt with the permissibility of prejudgment and hearing seizure of purportedly obscene materials. That issue is not involved in the instant case. The principal issue herein involved is the permissibility of denying adults access to protected materials based upon a standard of whether such materials are suitable

for minors where it has been stipulated that no *minors had visual, auditory,* or physical access to the materials. The opinion of the Court of Appeals fails to give a statement in writing as to such substantial question raised in the Record in the Motion to Correct Errors in paragraph 3, Record page 1, and briefed by the Defendant-Appellant in Appellant's brief commencing at page 29.

(g) In holding that the correct method of measurement under I.C. 35-49-3-3(3) is a straight line measurement between two (2) points where said statute is silent with respect to said matter. Evidence of conflicting distance measurements were presented and included in the Record, which are over the proscribed statutory distance, and the State of Indiana failed to carry its burden of proof on said issue.

WHEREFORE, Defendant-Appellant respectfully prays the Court to grant this Petition for Rehearing; vacate its opinion of November 22, 1988; and, reverse the conviction of the Defendant Appellant and remand the case to the Trial Court with instructions to grant the Defendant-Appellant's Motion to Dismiss and Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted,

LEE J. KLEIN, P.C.
8252 East Lansing Road Suite 101
Durand, Michigan 48429

LOCKYEAR & KORNBLUM
By: /s/ James A. Kornblum
555 Sycamore Street
P.O. Box 3515
Evansville, IN 47734-3515

ATTORNEYS FOR DEFENDANT-APPELLANT

APPENDIX T

REQUEST FOR ORAL ARGUMENT

(United States District Court —
Southern District of Indiana —
Evansville Division)

(Filed November 12, 1993)

(STUDIO ART THEATRE OF EVANSVILLE, INC. and WILLIAM MONTROSE, Plaintiffs, -vs- CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants — CAUSE NO. EV 90-192-C)

COMES NOW the plaintiffs, by counsel, James A. Kornblum of the law firm of Lockyear & Kornblum, and pursuant to the provisions of S.D.IND. L.R. 7.5, do hereby request oral argument on the issues presented by plaintiffs' Motion for Partial Summary Judgment under Federal Rules of Civil Procedure, Rule 56.

Respectfully submitted,

SHAFER & MAIER, P.C.
4121 Okemos Road, Suite 20
P.O. Box 1426
Okemos, MI 48805-1426

LOCKYEAR & KORNBLUM
By: /s/ James A. Kornblum, #5309-82
555 Sycamore Street
P.O. Box 3515
Evansville, IN 47734-3515

ATTORNEYS FOR PLAINTIFFS

(*Certificate of Service Omitted*)

APPENDIX U

EXCERPT FROM APPELLANTS' BRIEF

(United States Court of Appeals — Seventh Circuit)

(Filed July 27, 1995)

(STUDIO ART THEATRE OF EVANSVILLE INC. and WILLIAM MONTROSE, Plaintiffs/Appellants, v. CITY OF EVANSVILLE, INDIANA; ART GANN, as Chief of Police of the Evansville Police Department; STANLEY LEVCO, as Prosecutor of the County of Vanderburgh, Indiana; and PAMELA CARTER, Attorney General of the State of Indiana, Defendants/Appellees — Appeal From the United States District Court, Southern District of Indiana, Evansville Division Cause No. 90-C-192; Hon. Gene E. Brooks)

* * *

5. *Res Judicata* And Collateral Estoppel Do Not Bar An Action Seeking Prospective Declaratory And Injunctive Relief.

As has been discussed above, a critical distinction between the circumstances here and the decision in *Heck* is the fact that the Plaintiffs in the Federal action below have sought declaratory relief not specifically to invalidate the previous state conviction of Studio Art, but, rather, to enjoin *future* enforcement of I.C. § 35-49-3-3(3) and its use as a predicate act for further prosecutions that may be brought pursuant to I.C. § 35-45-6-2. *See, eg.*, Appx. C, Complaint, pg.12 ¶'s 1 & 2. The consequence of the prior state conviction need not be decided in this litigation, but will be, rather, resolved pursuant to the Agreement previously executed by the parties. Appx. G, ¶'s 9 & 10.

Statutory constitutional adjudication in a state prosecution cannot be utilized under either *res judicata* or collateral estoppel to bar a § 1983 federal action seeking

to declare the underlying statute unconstitutional and to enjoin its use in *future* prosecutions. *Mustfov* v. *Superintendent of Chicago Police Department*, 733 F.Supp. 283, 292 (N.D. Ill. 1990) ("*Mustfov I*"), citing *Mustfov* v. *Rice*, 633 F.Supp. 1255, 1259-60 (N.D. Ill. 1987) ("*Mustfov II*") and *Wolley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). *See, also, Supporters to Oppose Pollution, Inc.* v. *Heritage Group*, 973 F.2d 1320, 1326 (7th Cir. 1992) (traditional principles of preclusion allow additional litigation if some new wrong occurs).

At issue in *Mustfov II* was the question of whether a state criminal prosecution, in which the defendant there could have raised a challenge to the constitutionality of the underlying law but did not, could act as a bar to a subsequent § 1983 action brought by that same defendant in which he then challenged the constitutionality of the ordinance at issue. The District Court held that collateral estoppel and *res judicata* would attach to that portion of the § 1983 claim seeking to invalidate the state conviction, but would *not* apply to the part of the federal suit seeking relief from *future* prosecutions. The District Court held:

> "Finally, we reiterate our holding in *Mustfov I*, that res judicata has no bearing on the plaintiffs' action insofar as it seeks *prospective declaratory and injunctive relief regarding the constitutionality of future enforcement and prosecution of the ordinances*. The plaintiffs have demonstrated, and the City apparently concedes, that there exists a genuine threat of further prosecutions against the plaintiffs under the allegedly unconstitutional ordinances and that they possess a legitimate expectation that the allegedly unconstitutional procedures of enforcement will continue to be employed as well. Accordingly, the plaintiffs have standing to bring their claims for declaratory and injunctive relief". *Mustfov II*, 733 F.Supp. at 292 (emphasis added and citations omitted).

The same circumstances apply here. The Parties' Joint Stipulation of Facts clearly states that the Defendants have threatened future prosecution of the Plaintiffs, as well as the officers, agents, and employees of Studio Art, for violations of I.C. § 35-45-6-2 and the predicate offense of I.C. § 35-49-3-3(3). Appx. E, ¶'s 14 & 17. Consequently, for the reasons as are set forth by the District Court in *Mustfov*, neither *res judicata* nor collateral estoppel could serve as a bar to the Plaintiffs, request for declaratory and injunctive relief to preclude *future* enforcement of these unconstitutional provisions. *See, also, Neufeld* v. *City of Baltimore*, 820 F.Supp. 963, 966, 969 (D. Md. 1993) (holding that a civil action pursuant to § 1983 seeking to enjoin the future enforcement of an ordinance on the ground that it is constitutionally preempted was not barred by either *res judicata* or collateral estoppel, even though the plaintiff to that action had been convicted in a state court proceeding of violating the ordinance that was ultimately, in the federal action, declared to be preempted).

6. Other Exceptions To *Res Judicata* And Collateral Estoppel.

a. FACIAL CONSTITUTIONAL CHALLENGE.

The facial constitutional challenge to I.C. § 35-49-3-3(3) as raised by these Plaintiffs represents an exception to collateral estoppel and *res judicata*. It is clear that there are, indeed, exceptions to the barring of a § 1983 action on the grounds of collateral estoppel or *res judicata*. One of those exceptions, already discussed above, is when the "party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Haring* v. *Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983), citing *Allen* v. *McCurry*, 449 U.S. 90, 101, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980). The Supreme Court has further noted that additional exceptions to collateral estoppel may be warranted in § 1983 actions

"in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'" *Haring*, 462 U.S. at 313-14 (citations omitted).[10] It is readily apparent that a *facial constitutional challenge* to an underlying criminal statute upon which an individual has been charged and convicted is one such additional appropriate exemption from applying *res judicata* and/or collateral estoppel to an action pursuant to 42 U.S.C. § 1983. In *Allen*, the Supreme Court noted that:

> "In reviewing the legislative history of § 1983 in *Monroe* v. *Pape*, [44 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1961)] the Court inferred that Congress had intended a federal remedy in three circumstances: where *state substantive law was facially unconstitutional*, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. . . . In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Allen*, 449 U.S. at 100-101 (clarification and emphasis added, citations omitted).

The Supreme Court then noted that the two procedural law elements discussed there were "essentially the

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10 The Court has already noted additional exceptions when "controlling facts or legal principles have changed significantly since the state-court judgment . . . or when special circumstances warrant exception to the normal rules of preclusion." *Haring*, 462 U.S. at 313 n.7 (citations omitted). "Special circumstances" would seem to exist in a circumstance such as this which is *not* bound by the overriding concern of protecting the exhaustion requirement of federal habeas corpus review as noted in *Heck* and *Preiser*. If an action pursuant to 42 U.S.C. § 1983 is to serve as a appropriate, *meaningful and viable* alternative for those who cannot invoke the protections of the federal habeas corpus statute, an exception to preclusion would have to exist or else the remedy would be meaningless, and indeed, toothless.

same" as the exception for collateral estoppel that had already existed; that being the opportunity for a "full and fair" ability to litigate the claim or issue decided by the first court. *Id.* Since the Court observed that of the three circumstances specifically referred to in the legislative history, two were already incorporated into known exceptions to the collateral estoppel doctrine in § 1983 cases, it only seems to reason that the third element discussed in the legislative history, *that being where the state substantive law was facially unconstitutional*, is also an exception as well.

That this is true is reinforced by the dissenting opinion of Justice Blackmun who, when in criticizing the holding of the majority in *Allen*, noted that:

> "... The Court's recounting of the legislative history and its articulation of these three purposes were intended only as illustrative of *why* the 42d Congress chose to establish a federal remedy in federal court, not a delineation of *when* the remedy would be available." *Allen*, 449 U.S. at 111 (Blackmun, J., dissenting) (emphasis in original).

Therefore, in attempting to argue for a much broader ability to bring § 1983 actions in the context of prior state criminal prosecutions, Justice Blackmun concluded that the majority's holding in *Allen* was that it was setting up just three exceptions to the general preclusive nature of prior state court adjudications; two procedural, and one substantive (i.e., that the underlying law is facially unconstitutional).

Since the Plaintiffs below did challenge the facial constitutionality of the underlying substantive law, under the holding of *Allen*, the federal action on appeal here represented an exception to *res judicata* and collateral estoppel, which is specifically evidenced in the legislative history of the federal Civil Rights Act. Therefore, the District Court erred in holding that either collateral estoppel or *res judicata* should have barred this action.

It should also be observed that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Courts should not give preclusive effect to matters upon which there "exists some doubt about what was decided in the first action . . . ". *Bojrab* v. *John Carr Agency*, 597 N.E.2d 376, 379 (Ind. App. 3 Dist. 1992). Since there is no doubt that the state courts simply ignored the ultimate constitutional issue raised by Studio Art, "redetermination" (or actually *initial* determination) is warranted here, free from any argument of *res judicata* or collateral estoppel.

b. UNMIXED QUESTION OF LAW.

This action, and particularly that portion encompassing the facial constitutional challenge, represents an exception to the preclusive nature of a prior state action to a § 1983 claim in being an "unmixed question of law." This doctrine was first announced by the Supreme Court in *United States* v. *Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 69 L.Ed. 262 (1924), and further discussed in *Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). This rule holds that if a court has enunciated a *rule of law* in one action, the parties (even identical parties) in a subsequent action of a different kind are not estopped to insist that the law is otherwise. *Montana*, 440 U.S. at 162. The Court noted that "this exception is of particular importance in constitutional adjudication." *Id.*, at 162-163. Assuming, arguendo, that the state courts did, in fact, render a ruling on the constitutionality of I.C. 35-49-3-3(3), there is an unmixed question of law in the two actions, since the facts have been stipulated to by the parties and all that the District Court needed to have resolved was a pure legal issue.[11]

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[11] Even though raised by the Plaintiffs' in their brief to the trial court (R. 39, p. 21), for whatever reason, the District Court failed to discuss this argument in its Memorandum.

VII.
CONCLUSION

For the reasons as set forth above, Plaintiffs respectfully request that this Honorable Court enter an order reversing the decision of the District Court, and remanding this action for the District Court's consideration of and decision on Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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Dated: July 27, 1995

APPENDIX V

RELEVANT STATUTORY PROVISIONS

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42 U.S.C. 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

INDIANA CODE 34-3-18-1

34-3-18-1. Admission in civil actions — Effect of pendency of appeal.

Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one [1] year, shall be admissible in any civil action to prove any fact essential to sustaining the judgment, and is not excluded from admission as hearsay regardless of whether the declarant is available as a witness. The pendency of an appeal may be shown but does not affect the admissibility of evidence under this section. [Acts 1982, P.L. 201, § 1.]

INDIANA CODE 35-45-5-1

35-45-5-1. Definitions

As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern or racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting . . . .

* * *

INDIANA CODE 35-45-6-1

35-45-6-1. Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item

containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit . . . a violation of IC 35-49-3 . . .

INDIANA CODE 35-45-6-2

35-45-6-2. Corrupt business influence — Penalty.

(a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

INDIANA CODE 35-49-2-2

39-49-2-2. Matter or performance harmful to minors.

A matter or performance is harmful to minors for purposes of this article if:

(1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;

(2) Considered as a whole, it appeals to the prurient interest in sex of minors;

(3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and

(4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors. [IC 35-49-2-2, as added by P.L. 311-1983, § 33.]

INDIANA CODE 35-49-3-3

35-49-3-3. Providing obscene matter and performances before minors.

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

* * *

commits a class A misdemeanor. [IC 35-49-3-3, as added by P.L. 311-1983, § 33.]

INDIANA CODE 35-49-3-4

35-49-3-4. Defenses.

It is a defense to a prosecution under section 3 [35-49-3-3] of this chapter for the defendant to show:

* * *

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

* * *